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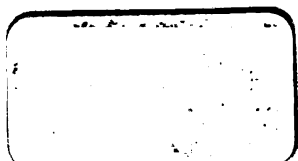
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REPORTS OF CASES

490

IN LAW AND EQUITY, ARGUED AND DETERMINED IN THE

SUPREME COURT OF GEORGIA,

AT ATLANTA.

PART OF JULY TERM, 1874, AND JANUARY TERM, 1875.

VOLUME LIII.

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NOTE.—By Act of 1866, (section 4270 of the Code) the decisions of the Supreme Court are required to be announced by written synopses of the points decided. The decisions thus announced from the bench by Judges McCAY and TRIPPE, are made the head-notes to the cases. The decisions announced by Chief Justice WARNER are published as his opinions, the head-notes being made by the Reporter. All other head-notes by the Reporter are designated by (R.)

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of Georgia,

AT ATLANTA.

JULY TERM, 1874.

PRESENT—HIRAM WARNER, CHIEF JUSTICE.
H. K. McCAY,
ROBERT P. TRIPPE, } JUDGES.

WILLIAM TOMLINSON *et al.*, plaintiffs in error, *vs.* ELIZABETH DRIVER, defendant in error.

1. Where complaint for land was brought by certain heirs-at-law, against the defendant, and their right to recover depended upon the question as to whether the husband of the defendant, when in life, held as tenant of plaintiffs' ancestor, the defendant, claiming under her deceased husband, is placed in the same position which he would have occupied, and is therefore incompetent to testify as to the character of his possession.
2. Where the verdict was required by the testimony independent of illegal evidence which had been admitted, a new trial will not be ordered.
3. Prior to this action, the plaintiffs having sued out a warrant against the defendant as a tenant at sufferance, to obtain possession of the land, and the defendant having filed an affidavit denying such tenancy, and a verdict having been returned in her favor, the judgment based thereon was conclusive of the fact that she did not hold possession as their tenant or as the tenant of their ancestor.

Witness. New trial. Judgment. Ejectment. Evidence. Possession. Before Judge KIDDOO. Schley Superior Court. October Adjourned Term, 1873.

Tomlinson *et al.* vs. Driver.

For the facts of this case, see the decision.

J. A. ANSLEY ; C. T. GOODE, for plaintiffs in error.

No appearance for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiffs against the defendant in the statutory form, to recover the possession of a tract of land in Schley county. On the trial of the case, the jury found a verdict for the defendant. A motion was made for a new trial, on the several grounds set forth therein, which was overruled by the court, and the plaintiffs excepted. It appears from the evidence in the record that the plaintiffs are the heirs-at-law of George Driver, deceased, in whom was the legal paper title to the land sued for. The defendant claims under her deceased husband, Isaac Driver, who died in possession of the land, but showed no paper title to the land in him. Although Isaac Driver was in possession of the land for several years before his death, the plaintiffs insist that he held such possession only as the tenant of George Driver, their deceased ancestor. On the trial, the defendant was offered as a witness to prove that her husband, Isaac Driver, did not hold possession of the land as the tenant of George, who had the paper title to the land, but claimed the land in his own right under a contract made with Leonard Driver. This evidence of the defendant was objected to on the ground that George Driver was dead. The court overruled the objection and admitted her to testify, and this is the main ground of error which was urged on the argument here.

1. Was the defendant a competent witness under the provisions of the 3854th section of the Code? The main issue on trial in this case, was whether Isaac Driver, the husband of the defendant, held possession of the land as the tenant of George Driver, who had the paper title, or not, and that depended on the relation which existed between them, in respect to that possession. George is dead and cannot testify as to

Tomlinson *et al.* vs. Driver.

that relation, and he being dead, Isaac, if living, could not have testified in his own favor against him, and the defendant, claiming under Isaac, stands in no better condition than he would have done. She is as much the other party to the issue on trial, in legal contemplation, as Isaac Driver, under whom she claims, would have been, if in life, and had been offered as a witness to testify in his own favor, consequently, she cannot be admitted to testify in her own favor as to the relation in which Isaac held possession of the land from George. This case comes within the principle decided in *Veal vs. Veal*, 45 *Georgia Reports*, 511. In our judgment, the court erred in allowing Mrs. Elizabeth Driver to testify in her own favor as to the manner in which Isaac Driver, her husband, held possession of the land under George Driver, and denying that he held possession thereof, as the tenant of George who had the paper title to the land. In view of the fact that our evidence act holds out to parties a strong temptation to testify in their own favor, even when the title to land is involved, we are not disposed to extend its provisions beyond the strict letter thereof in admitting their testimony.

2. In looking through the record, we find there is sufficient evidence to have required the verdict which the jury found, wholly independent of the illegal evidence of Elizabeth Driver.

3. It appears that in October, 1870, the plaintiffs, as the heirs-at-law of George Driver, sued out a warrant under the statute to obtain the possession of the land in dispute, against Elizabeth Driver, alleging therein that she was in possession of said land as a tenant by sufferance, and demanded possession thereof. Elizabeth Driver filed her counter-affidavit, in which she alleged she did not hold possession of said land as tenant, either by lease, rent, at will, or by sufferance, from the heirs-at-law of George Driver, or from any person under whom they claimed the premises. On the trial of this issue, the jury found a verdict for the defendant, and a judgment was entered thereon in favor of the defendant against the plaintiffs for the costs in that proceeding. It appears from the evidence that Isaac Driver, under whom the defendant claimed, had been

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in possession of the land since 1834, up to the time of his death in 1847, and the defendant had continued in possession ever since. The material question, therefore, was whether she held possession of the land as the tenant of George Driver or those claiming under him, either by sufferance or otherwise, and the verdict and judgment on the trial of the issue made by the possessory warrant proceedings, was conclusive as to the fact that she did not hold possession of the land as their tenant, or as the tenant of George Driver, under whom they claimed, and, that being so, the plaintiffs were not entitled to recover.

Let the judgment of the court below be affirmed.

THE ATLANTA AND RICHMOND AIR LINE RAILWAY COMPANY, plaintiff in error; *vs.* JANE M. AYERS, defendant in error.

1. A workman employed by a railroad company to do the work of an ordinary laborer on its track, and who is injured while he is being carried on a train of the company from the place of his work to the camp where he stays at night, comes within the provisions of sections 2083 and 3034 of the Code, so far as his right to recover damages for the injury, is affected by the question of negligence on his part.
2. Though in such a case the company or its agents may be guilty of negligence, yet if the injured party could have avoided the consequences to himself of that negligence by the exercise of ordinary diligence, he is not entitled to recover.
3. If it appears that both parties were guilty of negligence, and that the person injured could not by ordinary care and diligence have avoided the consequences to himself of the negligence of the company or its agents, he may recover, but the jury should lessen the damages in proportion to the negligence and want of ordinary care of the injured party.
4. The rule given in the case of the *Macon and Western Railroad Company vs. Johnson*, 38 Georgia, 408, for estimating damages where a suit is brought by a widow for the homicide of her husband, and no fault is proven on the part of the deceased, is affirmed. But the amount that such a rule would give should be lessened in proportion to the contributory negligence of the husband in causing his death.

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5. Under the evidence in this case, it was error in the court, when requested by the defendant to charge as to the doctrine of contributory negligence, to say in the hearing of the jury that "it did not apply to this case." The defendant was entitled to a charge on that question, and when the attention of the court was called to it, the law on that subject should have been given. The remark of the court was, in effect, a denial of the right of the jury to consider it.

Railroads. Master and servant. Husband and wife. Damages. Charge of Court. Before Judge RICE. Hall Superior Court. March Term, 1874.

Jane M. Ayers brought case against the Atlanta and Richmond Air Line Railway Company for \$10,000 00 damages, alleged to have been sustained by her by reason of the killing of her husband through the culpable negligence of the defendant. The general issue was pleaded.

The evidence made, in brief, the following case: On or about May 24th, 1871, Alvin D. Ayers, the husband of the plaintiff, was in the employ of the defendant as a track-raiser, for which services he received from \$1 00 to \$1 25 per day. The hands with whom he worked were stationed at Flowery Branch, a depot on defendant's road. On the day on which Ayers was killed, he, together with the other hands, had been at work about four miles from the above mentioned depot. At sunset, the gravel or construction train, stopped at this point for the hands to get on to be carried back to the afore-said depot, as it was too far for them to walk before dark. When this train approached Flowery Branch, the signal "on brakes" was given and the speed slackened. All the hands jumped off except Ayers. Some one cried out all-right, and the signal of "off brakes" was sounded. The deceased was then suspended between two cars, about to jump off, with his hands resting upon their ends. As the train started forward, the interval between the two cars was extended, causing him to fall upon the track, where he was cut to pieces by the wheels. He left a widow and two children, one a boy, eight years old, the other a girl, about six. He left no property, except personalty of the value of \$100 00.

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His family was entirely dependent upon him for a support. He was about thirty-five years of age. The testimony is conflicting as to whether the train was completely stopped or not at Flowery Branch.

The evidence introduced was voluminous. It is omitted, as the above statement will render clear the errors assigned upon the charge of the court.

The jury returned a verdict for the plaintiff for \$3,000 00. The defendant moved for a new trial upon the following grounds, to-wit:

1st. Because the verdict was contrary to the evidence and the charge of the court.

2d. Because the court erred in charging the jury as follows: "In this case, if the jury find, from the evidence, that the railroad train on which Alvin D. Ayres was a passenger, was stopped in order that he and the other passengers might get off, yet, if the railroad train was started on before he had time to get off, and he was placed under the necessity of attempting to get off while the train was in motion, rather than be carried away from the place where he was to be put off, and in attempting to get off, while the cars were thus in motion, he was injured or killed, then the defendant would be liable in consequence of a want of proper and reasonable care and diligence with respect to Alvin D. Ayres."

3d. Because the court erred in this, that when requested to charge in reference to the contributory negligence of the deceased, the presiding judge said, in the hearing of the jury, "it did not apply to this case."

To the motion the judge attached the following notes:

The second ground omits a material portion of the charge which is necessary to an understanding of that portion which is set out. It was as follows: "It is not only the duty of a conductor or manager of a railroad train to stop, that its passengers may get off, but it is his duty to stop long enough for its passengers to get off and to see that they are off before he moves forward on the road." Then follows the portion of the charge set out in the motion.

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- The words excepted to in the third ground were only the reply of the court to a verbal request of counsel to charge as indicated, and which request was made after the court had concluded its instructions; which, in its opinion, covered all the principles involved in the case.

The motion was overruled, and defendant excepted.

J. N. DORSEY; J. B. ESTES; J. F. LANGSTON; E. M. JOHNSON, for plaintiff in error.

J. N. GLENN; PEEPLES & HOWELL; S. C. DUNLAP, for defendant.

TRIPPE, Judge.

1. The old rule that the employer is not responsible to an employee for damages which the latter has sustained, on account of the negligence of a fellow-servant, has been abolished in this state. Section 2083 of the Code puts employees on the footing of passengers. A passenger may recover when he may be at fault, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him: Section 3034. Then comes the provision in section 3036, which has been construed in 35 *Georgia*, 105, to mean that if the employee is guilty of fault or negligence, he cannot recover at all. Even under the old common law rule, as stated above, it has been a question, with conflicting decisions upon it, whether a person sustaining the relation to the railroad company which the deceased did in this case, when he was injured, could maintain an action, that is, did he stand in the relation of a co-servant to the negligent servant by whose fault it is alleged he received the injury. For there is strong and respectable authority, holding that such a relation as that of co-servant just stated, must exist before the injured servant can be denied the protection of the maxim *respondeat superior*. Pierce, in his work on American Railroad Law, page 299, calls this a reasonable doctrine, and approves the general principle implied in it. There are two cases from Indiana, which recognize this principle and strongly points out where instances of distinct employments on the

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part of the servants, existed, and, on that account, the injured one was taken out of the old rule, which would have prevented him from recovering: 5 Indiana, 339; 7 *Ibid.*, 436. The latter of these two cases is somewhat similar to the one under consideration. A laborer was employed upon one part of the road to load and unload gravel and distribute it upon the road at some distance from his boarding place, and by agreement was to be carried to and from his work. He was injured by a collision with another train caused by the negligence of the engineer on the train in which he was carried. It was held that the company was liable. There are contrary decisions to these in other states: 10 Cush., 228; 4 Met., 49; 23 Pa., 384. See, also, Redf. on Railways, sec. 170; Shear. and Red. on Neg., secs. 108, 109, 110. Pierce, in his work already referred to, concludes on this question, with the remark: "It may not be easy to state the principle which will distinguish in advance one department of service from another, so that the employees in one are not to be considered the co-servants of persons employed in another; but the distinction itself cannot well be denied." Considering the conflicting views upon the question, and the provisions of our own Code, removing generally, in section 2083, the disability that formerly rested on an employee, preventing him from a recovery for an injury caused by the negligence of another employee, we think, under a proper construction of all of said provisions, that a workman employed by a railroad company to do the work of an ordinary laborer on its track, and who is injured while he is being carried on a train of the company from the place of his work to the camp where he stays at night, comes within sections 2083 and 3034 of the Code, and that his right to recover damages for the injury is affected by the question of negligence on his part, as it would be in ordinary cases of persons sustaining no relation to the road as employees.

2. This being the principle governing this case, necessarily brings it within the rule established in the case of *Macon and Western Railroad Company vs. Johnson*, 38 Georgia, 409, to-wit: Though the company or its agents may be guilty of

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negligence, yet, if the injured party could by the exercise of ordinary diligence, have avoided the consequences to himself of that negligence, he is not entitled to recover any damages from the company. .

3. And if it appears that both parties were guilty of negligence, and that the person injured could not by ordinary care and diligence have avoided the consequences to himself of the negligence of the company's agents, the plaintiff may recover, but the jury should lessen the damages in proportion to the negligence and want of ordinary care of the injured party.

4. As this case will undergo another investigation, it would be well for counsel to look to the rule prescribed in the case referred to in 38 *Georgia*, for ascertaining the measure of damages when a suit is brought by a widow for the homicide of her husband. So far as it appears from the record, the testimony in this respect furnished no satisfactory measure. That rule is affirmed. It is stated in the third head-note of that case to be the rule where there is no fault proven on the part of the deceased. But it is apparent from the whole case, and from the principle that has already been decided in it, as appears from the preceding head-notes to it, and which are in substance given above, that the amount that such a rule would give, when there is no default on the part of the husband, should, if he were in fault, be lessened in proportion to his contributory negligence in causing his death.

5. The court was requested to charge the jury on this subject. Under the evidence, we think the defendant was entitled to have the law upon it given to the jury. It is true, no special request in writing was made. But when the court replied, "it did not apply to this case," it was in effect a denial of the right of the jury to consider the matter of negligence or want of care and prudence on the part of the deceased. This would prevent them from diminishing the damages on account of the fault or negligence of the husband, and that question should have been left to the jury. We think there should be a new trial.

Judgment reversed.

Alston vs. Wingfield.

JAMES M. ALSTON, plaintiff in error, vs. JOHN T. WINGFIELD, administrator, defendant in error.

1. A vendor of real estate, who sells it upon credit, taking the vendee's notes and giving bond to make titles when the purchase money is paid, has a right to sue in ejectment upon the failure of the vendee to pay the notes, or either of them, according to their tenor and effect. Nor does his receipt of a portion of the purchase money, even after all the notes are due, alter this right to sue and recover the land. He may, at law, do so at his pleasure. It is only in equity that the vendee can restrain him, and even then he must show that he is not himself in default, or must allege that he is ready, and offer to comply with his own duties under the contract.
 2. When three promissory notes were due at fixed times, and after the maturity of all of them, the following words were written across the face of each, and signed by the maker: "I agree to pay ten per cent. on this bill till paid :"
- Held*, that this was no fixing of any new day of payment of the notes ; nor is it competent to show by parol that the time agreed upon was ten years, it not appearing that the failure to fix the time was left out of the writing by accident, fraud or mistake. The writing speaks for itself, and leaves the debt due and the maker of the note in default so long as the note remains unpaid.
3. That the defendant in an action of ejectment has been adjudged a bankrupt since the verdict against him in the superior court, is no ground for staying the proceeding in this court, on a writ of error brought by said defendant complaining of error in the judgment below, and especially is this true if there be no verdict for *mesne profits*.

Vendor and purchaser. Bond for titles. Ejectment. Promissory notes. Evidence. Bankrupt. Practice in the Supreme Court. Before Judge CLARK. Sumter Superior Court. October Term, 1873.

On November 20th, 1867, Nicholas Wylie sold to James M. Alston a tract of land in the seventeenth district of Sumter county, containing three thousand seven hundred and fifty acres, at the price of \$21,000 00, for which Alston gave his three notes, each for \$7,000 00, and due January 25th, 1868, 1869 and 1870, respectively. The following is a copy of the first note; the balance are similar, except as to the time of maturity :

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"\$7,000 00. WASHINGTON, GEORGIA, Nov. 20th, 1867.

"On or before the 25th of January, 1868, I promise to pay Nicholas Wylie, or bearer, seven thousand dollars, it being in part payment for land in Sumter county, in said state, specified in bond for titles bearing even date with these presents, with interest from 25th December, 1867. Value received.

(Signed)

"J. M. ALSTON."

Wylie gave to Alston his bond conditioned to make titles to him "on the receipt of the said sum of \$21,000 00, and the interest which may accrue thereon."

On February 10th, 1870, a credit of \$3,000 00 was indorsed on the first note, signed by Wylie. On December 23d, 1870, the following entry was made on the back of the sheet of paper upon which all three of the notes were written:

"I promise to pay ten per cent. on the within notes from the first of January, 1871, until the notes are paid off.

(Signed)

"JAMES M. ALSTON."

Wylie died in 1872, and letters of administration issued to John T. Wingfield on August 6th, of that year. The purchase money, with the exception of the \$3,000 00 aforesaid, remaining unpaid, Wingfield, as administrator, commenced his action of complaint for the land. The defendant, Alston, pleaded as follows:

1st. The general issue. 2d. That the condition on which plaintiff's intestate let the defendant into the possession of the land had not been broken, because before the maturity of the notes for the purchase money of the land, he, for a sufficient consideration, extended the time of performance to November 1877. 3d. That defendant's continuance in possession did not depend on the performance of any condition, there being no time fixed in the bond within which payment was to be made, so as to make non-payment of the purchase money a breach of the condition on which possession was held. 4th. That plaintiff's intestate, for a sufficient consideration, on December 23d, 1870, extended the day of payment of the pur-

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chase money indefinitely. 5th. That the defendant was induced to purchase said property on the faith of Wylie's representations that he had complete title to, and possession of, the same, and that the defendant should have ten years in which to pay therefor, without being disturbed in the possession; that Wylie's title and possession was not full and complete, in this, that one James Whitby was in adverse possession of five hundred and five acres of the land, claiming the same as his own, and the title to which was then in litigation; that Wylie had agreed not to require any further payment until this litigation was terminated; that defendant had placed improvements on the property to the value of \$15,000 00, and had paid \$4,000 00 of the purchase money, all of which he claimed should be refunded before the plaintiff was entitled to recover.

When the case was called for trial, the defendant presented a bill based substantially upon the grounds taken in the foregoing plea, asking that the suit be enjoined. The injunction was refused; and the defendant excepted.

The plaintiff demurred to the defendant's pleas. The demurrer was sustained as to all except the general issue, and that setting up an agreement on the part of Nicholas Wylie as to an extension of the time of payment of the purchase money. To which ruling the defendant excepted.

The plaintiff introduced in evidence the bond for titles executed by his intestate to the defendant (produced under notice,) the defendant's notes for the purchase money, and his letters of administration.

The defendant moved for a non-suit upon the ground that no cause of action was shown by the testimony. The motion was overruled, and defendant excepted.

The defendant introduced in evidence the entries on the notes for the purchase money hereinbefore set forth. Also, George W. Warwick, who testified, substantially, as follows: Was the confidential friend and adviser of Nicholas Wylie. Had several conversations with him in 1869, 1870, and February, 1871, in relation to the purchase of the premises in

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dispute by the defendant, in all of which he said that the defendant should have ten years in which to pay the purchase money; that he had so agreed, and that he intended to incorporate this agreement in his will; that witness heard nothing about paying interest.

Also, a letter from Wylie to the defendant, of date November 9th, 1869, in which, after giving him some general advice as to the management of the plantation, and recommending him to rely upon Mr. Warwick, he uses this language: "You had better let a part of the land rest than to let other people tend it and get all that is made on the land, if it takes you ten years to pay out and have stock enough. You have a good fortune there. I am disposed to stand up to you as long as I see you are pursuing the right way."

The defendant closed.

The plaintiff moved to exclude all the testimony of Warwick and the above letter. The motion was sustained, and the defendant excepted.

The defendant requested the court to charge the jury as follows:

"1st. The plaintiff must recover on the strength of his own title and not upon the weakness of defendant's.

"2d. If you believe from the evidence that in December, 1870, the parties made a new contract by which Wylie extended the time of payment, then you cannot find for the plaintiff on the original contract.

"3d. If you find for the plaintiff you may allow the defendant a reasonable time to pay for the land and require Wylie's estate to make good titles."

The court refused to charge as requested, and defendant excepted.

The court charged the jury as follows: "If you believe from the evidence that Nicholas Wylie, in his lifetime, sold the premises in dispute to the defendant, the defendant giving to Wylie his notes for the purchase money, payable at different dates, and Wylie giving his bond to make the defendant titles when the purchase money was paid, and that the de-

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defendant went into possession of the land under this contract, and that the notes given for the purchase price agreed on are past due and unpaid, then the plaintiff is entitled to recover the premises, and you should so find." To which charge the defendant excepted.

The jury found for the plaintiff. Error is assigned upon each of the above grounds of exception.

When this case was called in the supreme court, counsel for plaintiff in error called the attention of the court to the fact that his client had been adjudged to be a bankrupt since the rendition of the verdict in the court below, and objected to further proceeding. The motion was overruled, and the principle embraced in the third head-note announced.

HAWKINS & HAWKINS; R. F. LYON; J. R. McCLESKEY, for plaintiff in error.

R. TOOMBS, for defendant.

McCAY, Judge.

1. This court is committed by numerous decisions to the general doctrine that in the case of the executory sale of land where the purchase money is not paid and no deed made, but only a bond for titles given, conditioned to be void if the vendor make titles on the payment of the notes, that the title, and therefore the right to sue and recover in ejectment, remains in the vendor until the purchase money is all paid: *Solomons vs. Day*, 40 Georgia, 32; *Thompkins vs. Williams*, 19 *Ibid.*, 569; *Doy, ex dem.*, *Miller vs. Swift*, 39 *Ibid.*, 91; *Ware vs. Jackson*, 19 *Ibid.*, 452; *McHan vs. Stansell*, 39 *Ibid.*, 197. And this works no wrong to the vendee, at least as between him and the purchaser, for he can always in equity, and perhaps under the Code, at law, pay, or offer to pay, by bringing the money into court, the amount due, and demand his title. We have looked into the cases referred to by the plaintiff's counsel, but we do not think they meet his case. The references to Tyler on Ejectment are, as we understand them, in harmony with the doctrine we

insist upon in the case of executory contracts for the sale of land. There are, doubtless, special rules applicable to the relation of landlord and tenant, but they stand upon their own nature. In the case of a vendor of land who has given bond for titles on the payment of the purchase money, the very purpose of retaining the title is to protect himself by insisting on his legal right. We recognize that if the vendee pays or makes improvements, that he has an equity, even after condition broken, to pay the balance and demand a title. But the vendor's right is the legal title, and, therefore, the legal right to the possession, unless the vendee comply with the bargain on his part. The land, until the purchase money is all paid, is legally the property of the vendor, and subject to be sold under a judgment against him, even though that judgment be obtained after the date of the bond.

2. We are not prepared to say that if a new day of payment were definitely and legally agreed upon, that the right to sue might not be waived; but that ought to definitely and distinctly appear. Nothing appears here but a stipulation for ten per cent. interest until paid. That fixes no new day. The holder of the notes is not prevented from suing next day. An agreement to fix a new day, and thus extend the terms of the bond, is, in effect, an agreement in relation to the sale of land, or an interest therein, and ought to be in writing, under the statute of frauds. It is not pretended that it was in writing, or that it was intended to be in writing. The truth is, that the agreement, if one there was, was, in its nature, so loose that it was obviously impossible to put it in writing. At any rate, it was nothing but a parol agreement.

3. We do not see what the bankruptcy of the plaintiff in error has to do with this case. The verdict in ejectment, by the superior court, ousted him of the land. If anybody has a right to object to the prosecution of this case here, it is the defendant in error. He is not acting—he is the sufferer—he is not proceeding. On the whole, we affirm the judgment.

Judgment affirmed.

Bowling vs. Whatley.

MARY BOWLING, administratrix, plaintiff in error, vs. ORNAN WHATLEY, defendant in error.

1. When there has been a counter-showing to a motion for a continuance, and the testimony is conflicting, the decision of the court thereon will not be interfered with, unless it appears that there has been an abuse of discretion in the refusal of the continuance.
2. If the motion be founded on the ground that the defendant's health would not permit her to be present at the trial, and on the hearing of a motion for a new trial the defendant's affidavit is used, which neither states her condition at the time the trial was had, or shows wherein she could have suffered damage by reason of her absence, the refusal of the continuance is not a sufficient ground for granting a new trial.
3. A defendant who has filed a plea of *plene administravit* cannot, after the testimony is concluded and the charge of the court given to the jury, withdraw his plea, and then, on a motion for a new trial, assign errors in the ruling of the court in admitting evidence against such defense, or in the charge of the court in reference to the same.

Continuance. New trial. Administrators and executors. Before Judge BUCHANAN. Troup Superior Court. May Term, 1873.

Ornan Whatley brought complaint against Mary Bowling, as administratrix upon the estate of Archibald W. Tyree, deceased, for \$316 25, besides interest, alleged to be due upon certain promissory notes made by her intestate. The defendant pleaded the general issue and *plene administravit*.

When the case was called for trial, counsel for defendant moved for a continuance on account of the absence of their client caused by sickness and family affliction. A counter-showing was made by the plaintiff. The motion was overruled and defendant excepted.

After the testimony was closed and the jury charged, counsel for defendant withdrew the plea of *plene administravit* and relied upon that of the general issue alone. The jury found for the plaintiff. The defendant moved for a new trial because of error in overruling the aforesaid motion for continuance, and because of certain alleged errors in rulings and charges of the court, all of which were based upon the case

as presented by the plea of *plene administravit*. In support of the motion was attached the affidavit of the defendant, which failed either to state her condition at the time of trial, or to show in what manner she had been prejudiced by her absence. The motion was overruled and defendant excepted.

B. H. BIGHAM ; T. H. WHITAKER, for plaintiff in error.

TOOLE & MABRY, for defendant.

TRIPPE, Judge.

1. The counter-showing to the motion was supported by strong evidence, and we cannot say that the judge who was to pass upon it abused his discretion in refusing the continuance.

2. We are the more confirmed in our conclusion, from the fact that, on the motion for a new trial, the affidavit of the defendant was used, and it neither stated the condition of her health at the time of the trial, or her inability to attend court, or wherein she could have suffered damage by reason of her absence. Nothing was positively stated by the other witnesses showing that she could not attend court, and nobody could have better known as to that than the defendant herself. That omission in the affidavit was significant. Courts should not be left to grope in the dark ; and it may be strongly inferred, where one knows whether a particular thing is true or not, (and if it be true, it is to his interest to let it be known,) and he does not state it, that that fact does not really exist. In cases like the one under consideration, this rule is specially applicable.

3. The plea of *plene administravit* was filed. This cast a certain *onus* upon the plaintiff, and imposed a special risk on the defendant, if found against the plea. After the evidence was all in, and the charge of the court given, the plea was withdrawn. Whether this was done over the objection of plaintiff or not, does not appear. The withdrawal of the plea relieved the defendant (the administratrix,) from the danger of an alternative verdict—one reaching her individually.

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She could not do this and then except to the rulings or charges of the court on that question. The law cannot be speculated upon in that way. When the plea was withdrawn, all the issues growing out of it fell with it. If rights are claimed, the corresponding burdens must be borne.

Judgment affirmed.

REUBEN W. WADE, guardian, plaintiff in error, vs. ELBERY ROBERTS, defendant in error.

That the affidavit upon which an attachment was based was sworn to by the plaintiff "as guardian," was no ground to dismiss the proceedings. Such affidavit was the individual oath of the party swearing thereto.

Attachment. Guardian and ward. Before Judge STROZER. Decatur Superior Court. May Term, 1874.

For the facts of this case, see the decision.

E. C. BOWER, by B. B. BOWER, for plaintiff in error.

JOHN C. RUTHERFORD; I. A. BUSH, for defendant.

WARNER, Chief Justice.

The plaintiff sued out an attachment under the provisions of the 3293d section of the Code, and made affidavit before a notary public, as guardian of Leila M., Frances C., Alice M., William H., and Sarah C. Stafford, minor heirs of S. S. Stafford, deceased, that one Roberts was indebted to him, as such guardian, the sum of \$2,380 00; that he held said note as collateral security, and that the same is now due, and that said debt was created by the purchase of lots of land numbers two, three, thirty-eight and thirty-nine, in the twenty-seventh district of Decatur county, and that said Roberts is in possession of said property, for the purchase of which said debt was created. The affidavit was made in Early county. Bond and

security was given by the plaintiff, and attachment issued by the notary public, directed to all and singular the sheriffs and constables of the state, which was levied on the land described as the property of Roberts, who was the defendant therein, by W. W. Howell, sheriff. A motion was made by the defendant to dismiss the attachment on several grounds: First, because the affidavit was not sworn to according to law, the said Wade swearing as guardian, which is contrary to law. Upon which ground the bill of exceptions states, and all others stated in the motion, the court dismissed the attachment, and the plaintiff excepted.

The section of the Code under which this attachment was sued out declares that, "process of attachment may issue in behalf of *any* creditor whose debt is created by the purchase of property, upon such debt becoming due, when the debtor who created such debt is in the possession of the property for the purchase of which the debt was created." The court evidently dismissed the attachment on the first ground taken in the motion, and not upon all or any of the other grounds, because if any of the other grounds had been well taken, the same would have been amendable. Although Wade, the plaintiff, represented himself as guardian in the affidavit, still he made oath to the facts stated therein in his individual capacity; it was his individual oath, and if untrue, he could be indicted therefor. The fact that he was the guardian of the minor wards did not make the affidavit any the less his individual affidavit; he took his corporal oath as to the truth of it upon his individual responsibility. From the facts disclosed in the record, we are of the opinion that the issuing and levying the attachment in this case, was in pursuance of the provisions of the Code, and a substantial compliance with the requirements thereof, and that the court erred in dismissing it.

Let the judgment of the court below be reversed.

Curry vs. The National Bank of Augusta.

GEORGE P. CURRY, plaintiff in error, vs. THE NATIONAL BANK OF AUGUSTA, defendant in error.

1. A plaintiff in garnishment is not entitled to enter a judgment against the garnishee, because the answer was filed in vacation, the same having been so filed subsequent to the term next after service of the summons and before judgment was obtained against the principal debtor.
2. If the answer admits indebtedness to the defendant of a certain sum, but sets up that he is indebted to the garnishee in a certain other sum of a much larger amount, and the plaintiff asks a judgment for the sum so admitted, on the ground that a claim of the garnishee against the principal debtor, if not due, cannot be retained under the doctrine of set-off, and it does not appear from the pleadings that it is not due, the plaintiff should traverse the answer and prove the fact on which he relies, before he can assert any right to the judgment he seeks.
3. Where a garnishee discharges himself by his answer, he is entitled to a judgment against the plaintiff for the cost.

Garnishment. Costs. Before Judge GOULD. City Court of Augusta. May Term, 1874.

On December 22d, 1873, Curry instituted an action of complaint against Milledge L. Bonham, as maker, and Graham & Butler, as acceptors, on a draft dated April 7th, 1873, and due November 1st, next thereafter, for \$130 00, returnable to the February term, 1874, of the city court of Augusta. On the same day process of garnishment was served on the National Bank of Augusta. On April 4th, 1874, in vacation, the garnishee answered denying all indebtedness to the defendants, except in the sum of \$67 06, which appeared on its books, to the credit of Graham & Butler. The answer also set up that Graham & Butler were indebted to the garnishee in the sum of \$25,000 00, or other large sum, and it therefore claimed the right to retain the \$67 06 aforesaid, to be applied to said indebtedness. On May 25th, 1874, the plaintiff obtained a judgment against the defendants. Upon the call of the case against the garnishee the plaintiff moved for a judgment for the full amount of his claim. The motion was overruled and plaintiff excepted.

The plaintiff then moved* for a judgment for the amount

admitted to be due to Graham & Butler. This the court refused to allow, holding that the garnishee was entitled to appropriate said sum to the indebtedness to it. To this ruling the plaintiff excepted.

The garnishee moved for a judgment for \$5 00 costs against the plaintiff. This the court allowed and plaintiff excepted.

Error is assigned upon each of the above grounds of exception.

H. CLAY FOSTER, for plaintiff in error.

FRANK H. MILLER ; J. C. C. BLACK, for defendant.

TRIPPE, Judge.

1. The answer of the garnishee was not filed at the return term of the summons, nor was that the term at which judgment could have been obtained against the principal debtor. It was the first term after suit was commenced against him. The answer of the garnishee was made out and filed after the adjournment of that term, but before the judgment term for the main suit. We do not think that by this the garnishee forfeited all right, and was subject to have judgment entered against him as a defaulting garnishee who does not answer at all. It may be true that a garnishee should not make answer before the term of the court to which the summons is made returnable; but if no judgment can then be rendered against the main debtor or the garnishee either, the latter, by not then answering, should not be in a worse condition than the principal debtor. If the debtor does not defend or answer to the suit against him at the first term, he may still do so at the next. It is true, he may be put on terms, but never such terms as will deny him all rights and absolutely entitle the plaintiff to a judgment. Here nothing was asked of the garnishee. The right was claimed by the plaintiff to reject the answer altogether, and to take judgment for another person's debt against the garnishee. The court did not err in refusing such a judgment: See Code, sections 3304, 3536; 15 *Georgia*, 188; 32 *Ibid.*, 118; 38 *Ibid.*, 299; 45 *Ibid.*, 489.

2. The answer admitted that on the books of the garnishee there was a small balance due the debtor, but set up that there was a much larger indebtedness owing by that debtor to the bank. If the plaintiff rely on the point that the indebtedness of his debtors to the garnishee was not due, and that on that ground it could not be set off by the garnishee against what it owed to such debtors, he should have traversed the answer and set up that fact. It does not so appear by the answer. We take the answer to mean that such indebtedness was *due*. The point was made that the amount which the bank owed to the plaintiff's debtors was an amount due them as depositors. The answer does not so state, but simply says that the sum of \$67 00 is to their credit on the books of the bank. The character of that liability on the part of the bank is not shown.

3. Where a garnishee discharges himself by his answer he is entitled to a judgment against the plaintiff for his cost. This we take to be the proper construction of section 3549 of the Code. No point was made that the sum of \$5 00 was an improper amount.

Judgment affirmed.

THE WATER LOT COMPANY OF THE CITY OF COLUMBUS,
plaintiff in error, vs. THE BANK OF BRUNSWICK, defend-
ant in error.

1. When, pending a suit by a corporation, an act of the legislature was passed changing the name of the corporation, if corporators should consent, and the suit proceeded to judgment in the original name :

Held, that it was too late after judgment for the defendant to set up that there was no such corporation, especially if he fails to make it appear that the corporators accepted the new name.

2. Where an order was passed during term time by the judge, and put upon the minutes, establishing a lost execution without any notice to defendant, and a levy and return upon the same was made by the sheriff and the lost *fi. fa.* was subsequently found :

Held, that the entry upon the established copy was such an entry as pre-

Water Lot Company of Columbus vs. Bank of Brunswick.

vented the judgment from becoming dormant, and this, even though the plaintiff, after finding the original, upon his own motion, set aside the established copy.

Corporations. Judgments. Lost papers. Executions. Before Judge JAMES JOHNSON. Muscogee Superior Court. November Term, 1873.

On June 5th, 1854, the Bank of Brunswick instituted actions of *assumpsit* against the Water Lot Company of the city of Columbus, one for \$782 30, besides interest, and the other for \$250 00, besides interest, alleged to be due upon certain due bills. Judgments were obtained on June 7th, 1855, and executions issued on July 9th, 1855.

By act of February 13th, 1854, the name of the Bank of Brunswick was changed to that of the Union Bank, "if the stockholders therein so determine." It was further provided "that upon all contracts of any kind, heretofore or prior to the first day of September next, made by or with said bank, shall be good and valid, and may be sued on in favor of or against the said bank by its said new name, and that in all suits brought in favor of or against it by its present name, and which may be undetermined on the said first day of September next, it shall be sufficient to suggest upon the record the change of name made by this act, and said suits shall be proceeded in accordingly."

At the November term, 1873, counsel for defendant moved to quash said executions upon the following grounds:

1st. Because said *fi. fas.* are, as appears by their face and the entries on them, both dormant and barred by the statute of limitations.

2d. Because at the time the judgments were rendered on which the *fi. fas.* are based, there was not in existence any corporation having the name of the Bank of Brunswick or having authority to use that name.

On each of these executions were entries, in brief, as follows: A levy on certain property, of date September 1st, 1855. "Sale postponed to first Tuesday in November. October 2d, 1855.

Water Lot Company of Columbus vs. Bank of Brunswick.

Levy dismissed October 24th, 1873. (Signed) H. G. IVEY, sheriff." A levy on certain property of date October 25th, 1873.

It also appeared that the execution for the larger amount had been lost and a copy established with the aforesaid entries thereon, without any notice to the defendant. An additional entry had also been made on the same of a levy on certain property, of date April 1st, 1868. Pending the argument of the motion, counsel for the plaintiff, having found the original, had the order establishing the copy set aside. The motion was overruled and defendant excepted.

HENRY L. BENNING, for plaintiff in error.

R. J. MOSES, for defendant.

McCAY, Judge.

1. The question made as to the name is not vital. It is not denied that there was a corporation, and that the plaintiff was originally known by that name. The English rule, and the one adopted generally, is, that if the plea be that there is no such corporation, that is a plea in bar, but if the objection be merely as to the name, the plea is only a misnomer, and must be pleaded in abatement. The charter, as well as the change of name, is matter of public law, of which the court will take notice, so that the objection is really only in the nature of a plea in abatement: 1 Saunders' Reports, 340, note (*h.*;) 1 Bos. & Pull., 40; 30 Illinois, 120. Besides, it does not appear that the corporation ever accepted the new name, and the motion does not so allege.

2. This court has several times held that any proceedings by the plaintiff, showing that he claimed his judgment to be a subsisting one, entered of record—as putting in his *fi. fa.* to claim money, prosecuting a claim, etc., is a substantial compliance with the act of 1825, so as to prevent the judgment from becoming dormant. Here was a proceeding during term time, and an order passed by the judge, put upon the minutes by the plaintiff, based upon his claim of a subsisting judgment.

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Is not this as good as a return of no property, or a levy and an order to dismiss it? The point of the statute is not *action*, but some proceeding showing that the plaintiff claims his judgment to be subsisting. This copy was levied and a return made. True, the original was afterwards found. That the copy was abandoned does not, we think, change the result. The plaintiff was proceeding with his judgment. The copy was a legal copy, and the proceeding had all the substantial effect of a return on the original.

Judgment affirmed.

PAUL JENKINS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. If a prisoner burn a hole in the door, or attempt to burn one through the floor of a guard-house, situate in an incorporated town, merely for the purpose of effecting his escape, and not with the intent to "consume or to generally injure the building," and neither of such results occur, he is not guilty of the offense of attempting to burn a house, as defined in sections 4376 and 4381 of the Code.
2. The crime of which the prisoner was convicted is not sufficiently proved by the evidence to justify the verdict of guilty.

Criminal law. Arson. New trial. Before Judge HILL.
Houston Superior Court. May Term, 1874.

Paul Jenkins was placed on trial for the offense of arson, alleged to have been committed upon the guard-house, in the town of Fort Valley, on March 22d, 1874. The defendant pleaded not guilty. The evidence made the following case:

The guard-house referred to in the indictment had two doors to it, an outer and an inner door. On the day alleged the inner door was discovered to have a hole burned through it about one foot in diameter. The floor at the back of the room was also burned. At that point ignited matches were discovered. Burnt paper was found between the outer and inner door; also on the floor. Playing cards were also on

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the floor. The defendant was the only occupant of the guard-house. Fire could not have been communicated to the points above designated from without. Before the burning at the back of the room was discovered, the defendant stated that the inner door became ignited from lighting his pipe. After the attempt to burn the floor was perceived, he offered no explanation. The house is within the corporate limits of the town of Fort Valley. Had the guard-house been burned, it is probable that no other house would have been ignited. It is a small one-room brick house, twelve by fifteen feet. The defendant was not drunk when he was discovered, but looked as if he had been. There was one window to the house—one foot by two—with bars one-fourth of an inch apart. The outer door was covered with tin; the inner door was of two inches pine plank; one and one-half or two feet between the doors. The fire was out when the house was entered.

The jury returned the following verdict: "We, the jury, find the prisoner not guilty of arson, but of the attempt to burn, and we recommend the court to commute the sentence from hanging to imprisonment for life."

The defendant moved for a new trial because the verdict was contrary to the law and the evidence. The motion was overruled, and the defendant excepted.

DUNCAN & MILLER, for plaintiff in error.

W. S. WALLACE, solicitor general *pro tem.*, by W. B. HILL, for the state.

TRIPPE, Judge.

1. The attempt "to burn a house," referred to in section 4376 of the Code, must mean an *attempt to commit* the burning defined in section 4381, that is, "to consume or generally injure the house." One is not guilty of the crime of burning unless "the house is consumed or generally injured." If the offense of burning requires a total destruction or general injuring of the house to make it complete, then the attempt to

burn involves the intention to destroy or to generally injure. If the facts fall short of proving this intent, then the crime of attempted arson is not proved. Rape is the carnal knowledge of a female forcibly and against her will. An attempt to commit rape implies the intent to have that knowledge forcibly, etc. An assault with intent to murder must have in it all the elements which constitute murder, except the death of the party assaulted. So an attempt to commit arson must have all the features of arson except the actual destruction or the generally injuring of the house—that is, it must be shown to have been the intent of the defendant to do one or both of those things. So thought the supreme court of North Carolina, in the case of *The State vs. Mitchell*, 5 Iredell, 350. There the defendant was indicted for burning the jail in which he was confined. The door of the room in which he was placed and the ceiling of that room were partially consumed. The question raised was, that if the prisoner only intended to burn off the lock, so he could escape, and not to burn down the jail, he was not guilty. A contrary charge was given to the jury, and on a review of the case, the supreme court held that if it was not the intention of the prisoner to burn or destroy the jail, but he put fire to the lock to burn it off to effect his escape, and not to destroy, the felony was not complete. It was added by the court that if the prisoner willfully put fire to the jail with the intent to effect his escape by consuming or destroying it, he would be guilty if the jury should believe that his secondary intent was to burn and destroy the jail, although his main intent was thereby to effect his escape. This qualification was correct. The court referred to the case of *The People vs. Cotteral*, 18 John. 115, as an authority for the decision. That case does sustain the one quoted from Iredell, and asserts the same principle. The North Carolina case discusses the matter at length, both on principle and authority, and we think the conclusion is right. It is unnecessary to review the testimony contained in the record to show that, as it appears, this intent on the part the defendant in this case was not sufficiently shown to au-

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thorize a conviction involving life or imprisonment for life. It may be stated that the place where the attempt to set fire was made, the fact that there were materials unconsumed whereby the fire might have been continued, especially when taken in connection with the statement made by the chief witness for the state, that he thought the defendant "attempted to burn a hole," make it doubtful whether it was the intent of the prisoner, in the language of the Code, to consume or generally injure the house. This statement was made by the witness without objection, and after he had given a detailed account of all that he saw and the appearance of everything connected with the jail.

2. At any rate, under this testimony, where such consequences are involved, we think that an investigation on another trial would be best.

Judgment reversed.

HARDEMAN & SPARKS, plaintiffs in error, vs. WILLIAM BATTERSBY, defendant in error.

1. Where a court of equity would originally have had jurisdiction of the case, the fact that concurrent jurisdiction has been given to the common law courts, does not deprive it thereof; and where courts have concurrent jurisdiction, that first taking will retain it.
2. Where a warehouseman's receipt for cotton was lost or destroyed, a court of equity has jurisdiction of a bill filed for the recovery of the cotton, containing therein an offer of bond and security to indemnify the warehouseman from any subsequent liability on such receipt.
3. Especially should a demurrer to such a bill be overruled, where it appears that if the same be dismissed the remedy of complainant at law would be barred by the statute of limitations.

Equity. Jurisdiction. Warehousemen. Statute of limitations. Before Judge HILL. Bibb Superior Court. October Term, 1873.

For the facts of this case, see the decision.

R. F. LYON, for plaintiffs in error.

LANIER & ANDERSON, for defendant.

WARNER, Chief Justice.

This was a bill filed by the complainant, as the surviving co-partner of the firm of William Battersby & Company, against defendants, in which the complainant alleges that in May, 1864, Battersby & Company placed in the hands of one North certain cotton receipts given by the defendants, as warehousemen, to have the cotton specified therein shipped to them at Savannah, the cotton being the property of complainant; that North died without having removed or disposed of thirty bales of said cotton; that complainant is unable to find defendants' receipts for the cotton among the papers of North, after a careful search; that the same were lost, destroyed or misplaced whilst in the possession of North, and cannot be found; that complainant has demanded the cotton of defendants, which they said they would deliver on the production of their receipts, complainant then and there offering to indemnify them from liability to any other person or persons on said cotton receipts, as he was unable to produce them, said receipts having been lost, destroyed or misplaced, as before stated. The defendants refused to deliver the cotton. The complainant prays that defendants may be decreed to account to him for the value of the cotton, after allowing them all proper charges and expenses for and on account of the storage of said cotton, upon his giving bond and security as heretofore offered by him.

Such are substantially the allegations in complainant's bill, which was filed in the clerk's office on the 19th of October, 1867, and was pending in court without any demurrer thereto, until the 23d of January, 1874, when the complainant amended his bill, at which term of the court the case came on for trial. The defendants then demurred to the complainant's bill on the ground that there was no equity in it, inas-

much as the complainant had an adequate and complete remedy at common law. The court overruled the demurrer, and the defendants excepted.

1. The receipts for the cotton were not given by the defendants to the complainant, and we infer from the description given in the complainant's bill of the marks upon the several bales, that the receipts were given and delivered by the defendants to the planter, or to the parties who originally stored the cotton in their warehouse. In *Patten vs. Boggs*, 43 *Georgia Reports*, 167, it was held that where a warehouseman was sued in trover by one who claimed to be the assignee of his receipt for a number of bales of cotton, that it was not sufficient evidence of a conversion to show that the defendant refused to deliver the cotton to the claimant until the receipt was produced, or good security given to indemnify the warehouseman.

2. The point decided in that case, as applicable to the case now before us is, that the defendants, as warehousemen, are entitled to be indemnified before they can be required to deliver the cotton to the plaintiff, or to account to him for its value. Before the adoption of the Code allowing the common law courts to mould verdicts as verdicts and decrees are rendered and framed in equity proceedings, there can be no doubt, we think, that a court of equity would have had jurisdiction of the case as made by the complainant's bill, for the reason that the remedy in the common law court would not have been adequate to have decreed indemnity for the protection of defendants against their liability on their receipts. Inasmuch as a court of equity would originally have had jurisdiction of the case, the fact that concurrent jurisdiction has been given to the common law courts does not deprive a court of equity of the jurisdiction which it originally had; and when a court of equity and a common law court have concurrent jurisdiction, the court first taking will retain it: Code, section 3096.

3. The court of equity in this case having first taken jurisdiction of it, the demurrer was properly overruled, the

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more especially if the complainant's bill had been dismissed for want of jurisdiction, his remedy in the common law court might have been barred by the statute of limitations.

Let the judgment of the court below be affirmed.

GEORGE T. COCHRAN, plaintiff in error. *vs.* **WILLIAM B. SWANN**, defendant in error.

1. A creditor does not have a laborer's lien for work which he has done for the debtor by other persons hired by him to do the work.
2. Upon the trial of an issue formed in such a case, it is necessary to a recovery by the creditor for any part of the claim, that he should show for what portion of the work he is entitled to the lien and the value of such portion.
3. In such a proceeding the plaintiff cannot amend so as to change the case into an ordinary action of assumpsit or complaint.

Laborer's lien. Amendment. Before Judge BUCHANAN. Campbell Superior Court. February Term, 1874.

Cochran foreclosed a laborer's lien against Swann. The defendant denied the existence of the lien. Upon the trial, it appeared from the evidence of the plaintiff that the work was done by himself and five or six hands employed by him. What precise work he individually did, and the value of it, was not shown. Defendant moved to dismiss the proceedings. Before this motion was acted on, plaintiff proposed to amend by changing the proceeding into an action of assumpsit or complaint. The court overruled the second motion and sustained the first, to both of which rulings plaintiff excepted.

W. F. WRIGHT; **W. H. ANDREWS**, for plaintiff in error.

No appearance for defendant.

TRIPPE, Judge.

1. One who contracts to get cross-ties, and does get them by the employment of other persons, who do the work, does not have a laborer's lien against the party for whom he is to furnish the ties, for the payment of the debt thereby created: See *Wooten vs. Archer*, 49 *Georgia*, 388, and *Callahan vs. Savannah and Charleston Railroad, Ibid.*, 506. The principle decided in those cases control this.

2. If the defendant make an issue denying the existence of the lien, and the creditor wishes to recover for any part of the claim because that part of it does have the lien, he should show by proof for what portion of the work he is entitled to the lien, and the value of that portion. This was not done in this case.

3. In a proceeding for the summary enforcement of a laborer's lien, the plaintiff cannot amend so as to change the case into an ordinary action of assumpsit, or complaint under the statutory form. The case of *Danning & Tuttle vs. Stovall*, 30 *Georgia*, 444, is not a precedent for such an amendment. That was a regular action commenced by the usual petition and process, with the additional claim for the enforcement of the mechanic's lien, and the amendment allowed was to strike out that part of the petition referring to the lien and to insert such allegations as were necessary to sustain the case against the trust property. It was a suit instituted in the superior court, with regular service, and there were all the pleadings necessary to amend by: See *The Columbus Iron Works Company vs. Loudon*, decided at the present term, and *Parish vs. Murphy et al.*, 51 *Georgia*, 614. Here there are not such pleadings—there is no stock to graft upon. The law of amendment, liberal as it is, does not permit summary proceedings to enforce specific liens, which are governed by special regulations, to be changed into formal actions at law, which are controlled in their commencement and mode of bringing parties into court by totally different rules.

Judgment affirmed.

PETER McLAREN, plaintiff in error, vs. JOHN MCCARTY,
 executor, defendant in error.

1. Under the decision of this court in the case of *Akin vs. Freeman*, the dormant judgment ~~act~~ was suspended from November 30th, 1860, until the 21st of July, 1868.
2. A judgment not dormant under the law, at the date of the passage of the limitation act of 1869, is not affected by that act, and the plaintiff has three years after his judgment has become dormant, to sue out a *scire facias* to revive it.

Judgments. *Scire facias*. Statute of limitations. Before Judge JAMES JOHNSON. Muscogee Superior Court. November Term, 1873.

On January 10th, 1856, Hugh Dolan obtained a judgment against Peter McLaren, as garnishee, in a suit in which the Rock Island Factory was defendant, for \$127 50, principal, \$7 65 interest, and costs of suit. Execution issued on January 6th, 1857. Upon this paper were the following entries:

"Received, June 11th, of Hugh Dolan \$11 12, which included \$1 89, my fee for return, clerk's, sheriff's cost on this *fi fa*. (Signed) WILLIAM H. LAMAR."

"Copied from the *fi fa*. of same plaintiff vs Rock Island Factory. (Signed) A. RUTHERFORD, Clerk."

"Received, January 7th, 1857, of plaintiff, per Denton, attorney, \$4 50, balance clerk's and sheriff's costs on this *fi fa*. (Signed) "A. RUTHERFORD, Clerk."

On July 31st, 1873, John McCarty, as executor of Hugh Dolan, deceased, commenced proceedings to revive said judgment, returnable to the next November term of the court. To this proceeding the defendant pleaded the statute of limitations. The court charged the jury, in substance, that if they believed the facts as set forth in the judgment and execution introduced in evidence by the plaintiff, then his right of action was not barred by lapse of time. Also, that the plaintiff was entitled to three years in which to bring his ac-

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tion from the time that his judgment became dormant by lapse of seven years.

The jury found for the plaintiff. The defendant excepted to said charge and now assigns error thereon.

INGRAM & CRAWFORD, for plaintiff in error.

L. T. DOWNING, for defendant.

McCAY, Judge.

1. Though I did not agree to the decision of this court in *Akin vs. Freeman*, 49 *Georgia*, 51, still it is the law of this court, and the *fi. fa.* or judgment in this case, was not dormant more than three years before *scire facias* was sued out.

2. Assuming that the dormant judgment act was suspended on 18th December, 1860, the whole time from the 18th of December, 1860, is not to be counted. At the date of the passage of the act of 1869 the judgment was not dormant, and the act, in its terms, only applies to judgments *then dormant*. It is clear, therefore, that under the holding in *Akin vs. Freeman*, as the act of 1869 does not apply to it, the judgment was not dormant over three years before the issuing of the *scire facias*. And this was admitted in the argument. But it is said that under the last section of the act of 1869, the bar attaches. It is said the right to issue this *scire facias* has arisen since the 1st of June, 1865, and is therefore to be regulated by the Code, irrespective of the acts suspending the statute. That while the first seven sections of the act of 1869 only applies to rights of action accruing before the 1st day of June, 1865, yet the last section covers all cases where the right of action accrued since 1865. But we are clear that there is nothing in this last section broad enough to cover a *fi. fa.*, and to set the statute running as to it. That section expressly confines its operations to "all cases of the character mentioned in any section of this act," where the right of action has accrued since 1st of June, 1865. There is no case of an execution or judgment running to dormancy in the previous sections. This *fi. fa.* did not become dormant until

some time in 1871, and under the Code, or act of 1869, *scire facias* must have issued in three years from the date of the dormancy. This was done—the *scire facias* issued in July 1873.

Judgment affirmed.

WILLIAM B. TARVER *et al.*, plaintiffs in error, vs. HARRIET M. TARVER, for use, etc., defendant in error.

1. Under sections 3664 and 2672 of the Code, it is not necessary for the defendant in execution, who files an affidavit of illegality, to give a bond for the forthcoming of the property levied on, unless he “desires to take or keep possession of such property,” nor is he required by law to pay the costs due on the *fi. fa.* before his affidavit can be received.
2. By the act of 24th February, 1873, Code, section 1989, attorneys at law have the same right and power over judgments and executions to enforce their liens as their clients have, for the amount due thereon to them; “and no person can satisfy such judgment or execution until the lien or claim of the attorney is satisfied.”
3. When the amount due on the execution is sufficient to discharge the claim or lien of an attorney, and he is proceeding to enforce the same by levy, the defendant cannot arrest it by illegality on the ground that the plaintiff in the judgment has agreed for value to give indulgence, or by setting up that the claim of the attorney has been paid, and that he has no lien, unless such payment has been made by the defendant.

Illegality. Bond. Costs. Attorneys. Lien. Before Judge HILL. Twiggs Superior Court. April Term, 1874.

At the April term, 1873, of Twiggs superior court, Harriet M. Tarver obtained a decree in equity against William B. Tarver and Benjamin M. Tarver for \$52,500 00 principal, \$36,750 00 interest, and \$16 50 costs, to be levied of certain property charged by the will of Hartwell H. Tarver with the support and maintenance of said Harriet M. On the execution based on this decree the solicitors for the complainant made the following indorsement:

“The sheriff of Twiggs county, or his deputy, will levy this *fi. fa.* upon the property set forth and described herein,

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to make the sum of \$5,016 50, the amount due us for fees and costs, and advertise and sell the same on first Tuesday in January, 1874. December 4th, 1873.

(Signed)

“WHITTLE & GUSTIN,
“LANIER & ANDERSON,
“Plaintiff’s Attorneys.”

On December 5th, 1873, a levy was made in accordance with this direction. An affidavit of illegality was filed by the defendants, setting up the following grounds:

1st. That the complainant, Harriet M. Tarver, on or about the 5th of October last, for a valuable consideration, agreed to suspend the collection of any part of said execution until December 25th, 1874.

2d. That said solicitors have been fully paid for their services, and are entitled to nothing as fees on said claim, nor have they any lien on such *fi. fa.* for said fees.

Upon the trial of the issue thus formed, a motion was made to dismiss said affidavit of illegality, upon the ground that no forthcoming bond had been given by the defendants, and because the costs due on the execution had not been paid before the filing of such affidavit.

The levy was made upon several large tracts of land, and upon a large amount of personalty. Whether the property remained in possession of the defendants or not, does not appear.

The motion was sustained, and defendants excepted.

J. D. JONES, by Z. D. HARRISON; LYON & JACKSON, for plaintiffs in error.

WHITTLE & GUSTIN; LANIER & ANDERSON, for defendant.

TRIPPE, Judge.

1. Section 3672 of the Code provides that where an “affidavit of illegality is filed, and the party filing it desires to take or keep possession of the property (personal) he shall deliver

to the sheriff or other levying officer a bond," etc. This is the forthcoming bond, and is to be given when the affiant "desires to take or keep possession of the property." It does not appear in this case what was done with the property, whether the defendants in execution kept possession or not. It was the duty of the sheriff, if no bond was given, to take and keep possession of the personal property. It is only when personal property is levied on and the possession is kept by the defendant, that a forthcoming bond is required. Section 3664 says a forthcoming bond shall be delivered "as provided by this Code," and afterwards comes the provisions of section 3672, as quoted. Nor is the defendant required by law to pay the cost before his affidavit can be received. The affidavit may deny that the cost is due as well as any other part of the judgment or *fi. fa.* The old rule of court requiring the cost to be paid even in cases of injunction, does not now exist, and the matter is in the discretion of the chancellor, as well as the other terms on which the injunction may be granted: Rules in equity No. 1, and section 3150, Irwin's Revised Code, in connection with section 3212, New Code. Even if the defendant denies only a portion of the execution, and admits a balance to be due, his affidavit may be accepted as to the part so denied, and the balance is to be paid or the *sheriff proceed to raise it*: 30th Rule. We, therefore, are of opinion that though the judgment of the court was right in dismissing the affidavit of illegality, it was so for other reasons than those given.

2. The act of 24th February, 1873, (Code, section 1989,) enacts that attorneys at law have the same right and power over judgments and executions to enforce their liens as their clients have, for the amount due thereon to them, "and no person can satisfy such judgment or execution until the lien or claim of the attorney is satisfied."

3. This being so, if the amount due on the execution is sufficient to discharge the claim or lien of an attorney, and he is proceeding to enforce the same by levy, the defendant cannot arrest it by illegality on the ground that the plaintiff in

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the judgment has agreed, for value, to give indulgence, or by setting up that the claim of the attorney has been paid, and that he has no lien. If the defendant alleges that he has himself paid and discharged the lien, the case might be different; and also if there was a fraudulent collusion between the plaintiff and his attorney. But, generally, the question whether the attorney has a lien, or whether he has been paid, is a matter between the attorney and his client, the plaintiff, unless in a case where the defendant has paid such a portion of the execution that the balance due is not sufficient to pay the attorney's claim. In a case of that sort, it might be a question solely affecting the defendant, whether or not the attorney had a lien, or had been paid his claim. But this case cannot be controlled by such a fact. A much greater amount is due on the execution than is claimed by the attorneys. In *Chambers vs. McDowell*, 4 Georgia, 185, it was held that if a plaintiff in execution agrees with the defendant never to enforce his judgment, it operates as a discharge of the judgment. But if he covenants not to enforce it within a limited time, such covenant does not operate as a release of his right to levy within that time. He may levy his execution, and the defendant is left to his action for a breach of the agreement. This decision undoubtedly rests on high authority, and was doubtless a correct one. Whether it is affected by section 2879 of the Code, we do not decide. The point was merely suggested at the conclusion of the argument, and was not discussed. For myself, individually, I will say that I am inclined to think that the section does not alter the rule or change the law upon this point. For the reasons given, the judgment of the court below is affirmed.

Judgment affirmed.

NELSON TIFT, plaintiff in error, vs. JOSEPHINE TOWNS, defendant in error.

1. Where the owner of a bridge franchise contracts with a railroad company that the latter shall construct a bridge and keep it in repair, and that the former shall be entitled to all tolls except on the freights and passengers of the company, which should be passed free, in case of damages to a wagon and team by falling through, the action therefor should be brought against the owner of the franchise.
2. The owner of a bridge franchise is bound to exercise only such care and diligence in the construction of his bridge and the keeping the same in proper order, which every prudent man would exert in relation to the same property, in view of the object and purpose for which the same was erected and used by him.

Roads and bridges. Diligence. Before Judge STROZER. Dougherty Superior Court. April Term, 1874.

For the facts of this case, see the decision.

D. H. POPE; POE, HALL & LOFTON, for plaintiff in error.

D. P. HILL, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant, as the proprietor of a toll-bridge across Flint river, in the county of Dougherty, to recover damages sustained in consequence of the plaintiff's wagon and team falling through said bridge in crossing the same. On the trial of the case, the jury, under the charge of the court, found a verdict for the plaintiff for \$860 17. A motion was made for a new trial on the several grounds set forth therein, which was overruled by the court, and the defendant excepted. The two grounds of error which were mainly relied on in the argument before this court were: first, as to the liability of the defendant to a suit for the recovery of the damages complained of under the facts of the case; and second, for the alleged error in the charge of the court to the jury, and refusing to charge as requested.

1. It appears from the evidence in the record, that the defendant was the owner of the exclusive franchise to erect and keep a toll-bridge at the place where it was located ; that he made a contract with the Atlantic and Gulf Railroad Company to build the bridge and keep it in repair, and to pass its freights and passengers over it free of toll, and to be removed when it should become useless by the rebuilding of defendant's lattice bridge, which had been burnt, or on the completion of the railroad bridge of the company. The defendant, in consideration of his franchise, was to receive all the tolls collected from all others, except the railroad company's business ; that the defendant employed a bridge-keeper to receive the tolls and take care of the bridge. In our judgment, the action was properly brought against the defendant, who was the proprietor and owner of the bridge franchise, and by reason thereof received the tolls from all persons crossing the bridge, except the railroad company. Being the proprietor of the bridge franchise, and receiving the tolls arising therefrom, he was bound to keep the bridge in proper order for the safe crossing of the persons from whom he was entitled to receive such tolls.

2. The court was requested by the defendant to charge the jury, "that the proprietor of a toll-bridge is bound to use only ordinary care and diligence in the construction of his bridge, and keeping the same in proper order." The court refused this request, and charged the jury, in lieu thereof, as follows: "That the proprietor is bound to use due care and exercise proper diligence, and the use of skill and foresight, to pass the public safely, and negligence alone would be a breach of duty. Due care means a *high* degree of care, and casts on bridge owners the duty of exercising *all* diligence to see that whatever is required for the safe passage of the public, (such as that the bridge is in fit and proper order, and free from defects in the superstructure,) but this duty will not make bridge proprietors liable for injuries arising from latent defects in its structure, which no human skill or care could either have prevented or detected." By the 690th section of the Code,

the proprietor of any bridge is bound to exercise prompt and faithful attention to all his duties, as such, and if any damage shall occur by reason of non-attendance, neglect, carelessness or bad conduct, he is bound for all damages—that is to say, he is bound to exercise prompt and faithful attention in the discharge of all his duties required of him by law as such bridge proprietor, and he is also bound to exercise ordinary care and diligence in the construction of his bridge, and keeping the same in proper order for the safe passage of the traveling public over it. Ordinary diligence, as defined by the law of this state, is that care which every prudent man takes of his own property of a similar nature. The absence of such diligence is termed ordinary neglect. Extraordinary diligence is that extreme care and caution which very prudent and thoughtful persons use in securing and preserving their own property. The absence of such diligence is termed slight neglect. Gross neglect is the want of that care which every man of common sense, how inattentive soever he may be, takes of his own property: Code, sections 2061, 2062, 2063. The defendant was bound to exercise only such care and diligence in the construction of his bridge and keeping the same in proper order, which every prudent man would take and exercise in relation to the same property, in view of the object and purpose for which the same was erected and used by him. Did the defendant exercise such care and diligence? If he did, then he was not liable under the law. If he did not exercise such care and diligence, then the law makes him liable for his negligence. The charge of the court, that the defendant was bound to exercise a *high* degree of care and *all* diligence to see that the bridge was in fit and proper order, and free from defects in the superstructure, and charging, in connection therewith, “but this duty will not make bridge proprietors liable for injuries arising from latent defects in its structure which no human skill or care could either have prevented or detected,” was manifest error. The latter part of this charge was calculated to impress on the minds of the jury that the defendant was liable for *all other defects* in the

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structure of the bridge, except those which no human skill or care could have prevented or detected. Such is not the law as applicable to the liability of the proprietors of public bridges in this state, as we understand it. In our judgment, the court erred in not charging the jury as requested, "that the proprietor of a toll-bridge is bound to use only ordinary care and diligence in the construction of his bridge, and keeping the same in proper order," and in the charge as given, of which complaint is made, as set forth in the record, in relation to the defendant's liability as the proprietor of a toll-bridge. It was insisted on the argument, that notwithstanding the error in the charge of the court, the evidence in the record is such as to have required the jury to have found the verdict they did. We do not think so. If the court had charged the jury correctly as to the law, and they had found a verdict either way under the evidence, we should not have disturbed it.

Let the judgment of the court below be reversed.

ROBERT JOICE, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. An indictment for an assault with intent to commit a rape, is sufficient, if it shows the sex of the person assaulted, by other words of the indictment, without the use of the term "female."
2. To sustain a verdict of guilty on such a charge, the evidence should show that the defendant not only made the assault, but that it was his intent at the time, forcibly and against her will, to have carnal knowledge of the person assaulted.

Criminal law. Rape. Indictment. Before Judge SCHLEY. Bullock Superior Court. April Term, 1874.

Robert Joice was indicted for the offense of rape, as follows: "For that the said Robert Joice, in the county of Bullock and state of Georgia, aforesaid, on the 6th day of March, in the year 1874, with force and arms, in and upon

one Sarah E. Groover, in the peace of God and said state, willfully, feloniously and violently, did make an assault, and her, the said Sarah E. Groover, did then and there forcibly and against her will, feloniously ravish and carnally know, contrary," etc. The indictment also contained a count for an assault with intent to commit a rape. A motion to quash was made upon the ground that the indictment failed to show that the person upon whom the offense in each case alleged to have been committed, was a female. The motion was overruled, and the defendant excepted.

The evidence disclosed that Sarah E. Groover was in the kitchen of her father's house, washing up dishes by the light of a lamp; that as she started out of the kitchen door, the defendant blew out the light and caught her around the waist; that he did not pull her to him; that she called her father, who came; that it was dark in the kitchen when the lamp was blown out, though there were coals in the fire-place; that she came out of the kitchen crying; that this building was about thirty yards from the house.

The jury found the defendant guilty of an assault with intent to commit rape. A motion was made for a new trial because the court erred in refusing to quash the indictment, and because the verdict was contrary to the law and the evidence. The motion was overruled, and defendant excepted.

JAMES K. HINES, by A. B. SMITH, for plaintiff in error.

ALBERT R. LAMAR, solicitor general, for the state.

TRIPPE, Judge.

1. There was no abstract or brief furnished in this case, and the record was chiefly made up of the original papers used in the court below, and some of them separate and detached from the others. No objection was made to the hearing of the case on that ground. On looking through these papers we are satisfied that enough does not appear in the evidence as it was sent up, to authorize the verdict.

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2. To sustain a verdict of guilty on such a charge, the evidence should show that the defendant not only made the assault, but that it was his intent, at the time, *forcibly and against her will, to have carnal knowledge* of the person assaulted. We think that justice requires there should be another trial, and as the matter will be passed upon by another jury, we will not discuss the testimony. As to the point that the indictment did not allege the person assaulted to be a female, it is sufficient to say that the sex is shown by other words used therein.

Judgment reversed.

H. S. & J. M. ESTES, plaintiffs in error, *vs.* HUGH G. IVEY, sheriff, *et al.*, defendants in error.

1. It is a good practice for a judge to require the parties, when there are several, to a motion to distribute money, to state in writing their several claims and the grounds of them.
2. When, on the hearing of a motion to distribute money, the judge dismissed the claim of one of the parties on the ground that on its face it did not present any legal claim to participate in the division, and gave a judgment awarding the money to the other claimants, whilst it was within the discretion of the court, during the term, to open the judgment and allow an amendment, yet it was not error to refuse to do so during the progress of another trial, and especially if it is not stated what was the amendment proposed.
3. When one has possession of land under a bond for titles, and has paid part of the purchase money, it is competent for his judgment creditors to levy upon "the entire interest stipulated in the bond," and sell the same. But in such a case, notice that such is the extent of the levy must be given by the officer making the levy, to the holder of the bond, at the time of the levy or within a reasonable time before the sale.
4. When a defendant in execution is the vendee of land, and has only a bond for titles, and a portion of the purchase money has been paid, and the land is levied on and sold by judgments against the vendee, and no notice is given as required by section 3586 of the Code, nothing is sold but the interest of the defendant, and the vendor cannot claim any of the proceeds on the ground that his purchase money is not all paid. He has his remedy by filing a deed and selling the land, or by action of ejectment on his legal title.

Money rule. Practice in the Superior Court. Judgments. Amendment. Bond for titles. Levy and sale. Vendor and purchaser. Before Judge JAMES JOHNSON. Muscogee Superior Court. November Term, 1873.

Hugh G. Ivey, sheriff of Muscogee county, held certain funds in his hands, realized upon a sale of property under an execution against John F. Cleghorn. The levy under which such sale was made, was upon a "two-thirds undivided interest in and to a parcel of land," unnecessary here to be described. He was ruled at the instance of one of the judgment creditors of the defendant. To this proceeding various other creditors were made parties, and amongst them H. S. & J. M. Estes, who petitioned the court, substantially, as follows ;

The money in the hands of the sheriff, was raised by sale of certain real estate, to-wit: that described in the entry of levy. This property had been purchased of them by Jesse J. Bradford and John F. Cleghorn for the sum of \$2,500 00, of which \$400 00, besides interest, is still due and unpaid. For this balance they hold two executions, each for \$200 00, besides interest, against said Bradford and Cleghorn. They, therefore, pray that the money in the sheriff's hands may be paid to them.

There were judgments of older date than those upon which the executions in favor of H. S. & J. M. Estes were based, more than sufficient to exhaust the fund to be distributed. The court ordered the money to be appropriated to them in the order of their dignity. To this ruling H. S. & J. M. Estes excepted.

The bill of exceptions recites that "after said judgment had been rendered, and after the court had made some progress in another cause or causes," counsel for H. S. & J. M. Estes asked leave to amend the allegations in their petition claiming the aforesaid fund. This the court refused to permit, and petitioners excepted.

What the amendment proposed was, does not appear either from the record or bill of exceptions. It is to be gathered

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from the abstract and brief that the petitioners desired to show that the defendant in execution held the land from the sale of which said money was derived under a bond for titles from them, the condition of which would not become absolute until the payment of the \$400 00, besides interest, balance of the purchase money, which was represented by the executions presented by them.

Error is assigned upon each of the above grounds of exception.

L. T. DOWNING, for plaintiffs in error.

C. J. THORNTON, by R. H. CLARK; B. H. CRAWFORD,
by JAMES M. RUSSELL, for defendants.

McCAY, Judge.

1. We have no fault to find in this practice of Judge Johnson in cases like the present. Something of the sort would seem to be necessary for the intelligent administration of the law. There is a fund in the sheriff's hands for distribution. It is hardly possible, if there be several claimants, to do justice between them in such a way as that the record shall show what has been done without requiring just such a statement to be made by each party as the judge required in this case. The jurisdiction is an equitable one, and we would be very slow to interfere with any practice which, without doing injustice, shall have the effect to reduce into order and method the inevitable confusion which must arise in such cases where the parties are permitted to state by parol the nature and dignity of their claims, leaving the court to grope among the papers for the true points of the controversy.

2. As we said in the case of *Walton vs. Jones*, at this term, we recognize that during the time the judgment of the court, in such cases, is in the breast of the judge, it may be opened by him at his discretion, yet to justify an interference by this court the refusal to interfere must be grossly unjust. Necessary rules of order require that a point once made and

ruled upon shall continue settled, unless the court sees that injustice has been done. If a party may, as matter of right, ask and reask a rehearing, the public business cannot be done. Generally the rules of order are to be observed. The movant has a right to open and conclude—all points must be insisted on at once. A decision once announced must be acquiesced in, etc., etc. But if the court see that the principles of justice require a deviation from these rules, he may even reopen his own action and rehear a case. But this is very largely in his discretion, and he will only be reversed here when injustice has been done, and the party complaining be without fault. We can see no error in the refusal in this case. The court was occupied with other business, and the party failed to show what it was he had new in the case. If one be in default, as the complainant was here, and asks a review, he should take a proper time to make his request, and he should make it in such a way as that the court can see at once what is the point. This was not done here. The request itself was out of order, as there was other matter before the court.

3. Previously to the Code, it was necessary to file a bill to get at the right of the defendant in property situated as this was. His right was a purely equitable one. The land was the property of the vendor, and subject to levy and sale as his property. Taking this statute altogether, it is evident that the intent was to give the plaintiff in *fi. fa.* the right to do exactly what equity would have decreed, to-wit: to sell the land—the whole title—pay the vendor out of the proceeds all that was due him, and appropriate the balance to the judgment. To do this, we think the act must be complied with. If the levy be merely of the defendant's interest, or on the land as his property, the purchaser, if he gets anything, clearly ought only to get the defendant's interest, and if so, the vendor has no interest in the proceeds. He still holds the title, and he may proceed as though there had been no sale. If his (the vendor's) title is sold, then, and then only, can he claim the proceeds.

4. Nothing was done here indicating that the whole interest

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was sold; no notice was given, as the statute requires. Evidently there is a mistake in this section. The party to be notified ought, in common sense and common honesty, to be the holder of the notes. He is the party whose interests are to be affected. The holder of the bond generally gets notice by the levy. Here was no notice to any one. Nothing appears to show that the sale was of the whole title. We think, to justify a sale of the whole interest, as contemplated by this section (3586) of the Code, there should be reasonable notice, so that all parties, defendant and holder of the notes, shall know what is to be sold, and have due notice of what is about to be done. If there be no such notice, nothing is sold but the interest of the defendant, if that, and the purchaser gets nothing but the right to stand in the defendant's shoes. The vendor has still his remedy. The land is still his. He may sue, file his deed, and sell.

Judgment affirmed.

HUTCHINSON & BROTHER, plaintiffs in error, vs. ALECK JACKSON, defendant in error.

1. If, in a claim case arising under a levy of a lien *fi. fa.* in favor of a merchant, sued out before the act of 1870, the court holds that it is necessary for the plaintiff to put in evidence the affidavit and the order of the judge for enforcing the lien, and if he does introduce them, he cannot afterwards complain of such ruling.
2. When the execution was issued in a proceeding to enforce several liens, and on the trial of the claim, it appearing that some of the alleged liens were not good in the law, the plaintiff amended the fiat of the judge and the execution, by striking out of the order the amount for which there was no valid lien, and taking an order to make the execution conform thereto:

Held, that it was not error for the court to dismiss the levy. But if only a portion of the property levied on be claimed, the order of dismissal should be limited to that portion.

3. When such order of dismissal was granted, it was not error for the court to refuse to issue an order, on the ground of the insolvency of claimant, requiring the securities on the claimant's bond, in whose

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possession the property was, to hold the same as receivers until the final judgment of the court in the premises, or requiring them to retain the possession until a *supersedeas* could be sued out.

Factors. Practice in the Superior Court. Liens. Claims. Execution. Levy. Before Judge BUCHANAN. Troup Superior Court. November Adjourned Term, 1874.

On October 9th, 1869, Hutchinson & Brother foreclosed, in one proceeding, various factor's liens, given, as alleged in the affidavit, under the act of December 15th, 1866, aggregating in amount \$1,225 66, against Zachariah Colly and W. W. Wilder. The execution based upon such foreclosure was levied upon certain property as belonging to defendants. A claim to part of the property levied on was interposed by Aleck Jackson.

Upon the trial of the issue thus formed, plaintiffs tendered in evidence their execution with the levy thereon. Claimant objected to this testimony, because unaccompanied by the affidavit of foreclosure and the fiat of the judge of the superior court ordering execution to issue. The objection was sustained, and plaintiffs excepted.

Plaintiffs offered in evidence said affidavit, fiat and execution. Claimant objected to this testimony because it appeared on the face of the affidavit that a portion of the indebtedness was contracted neither for provisions nor commercial manures, but for mules. The objection was sustained, and plaintiffs excepted.

Plaintiffs moved to amend the fiat of the judge and the execution by writing off whatever amount appeared not to be for provisions furnished. This motion was allowed. Claimant then moved to dismiss the levy. The motion was sustained, and plaintiffs excepted.

Plaintiffs moved for an order directing the securities on the forthcoming bond to hold the property as receivers, subject to the final judgment of the court. In support of this motion they proposed to show that the property in controversy had been delivered to said securities, and that the claimant was in-

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solvent. The court refused such order, and plaintiffs excepted.

Plaintiffs then moved for an order requiring such securities to retain possession of said property until a *supersedeas* could be obtained. This motion was also refused, and plaintiffs excepted.

Error is assigned upon each of the above grounds of exception.

B. H. BIGHAM ; T. H. WHITAKER ; A. H. COX, for plaintiffs in error.

SPEER & SPEER, by F. M. LONGLEY, for defendant.

TRIPPE, Judge.

1. The court held that it was necessary for the plaintiff to introduce in evidence the affidavit and order of the judge enforcing the lien. He complied with the ruling of the court, and then complained that he was compelled so to do. It could not have affected the case whether such papers were offered by the plaintiff or claimant, that is, because they were so offered by the one instead of the other, could not matter, so far as it concerned the final result. They were properly in, whether introduced by the one party or the other, and it would be a mere waste of time and costs to send the case back for the purpose of forcing the claimant to put them in proof, when the same result would be obliged to follow.

2. The proceedings to enforce the alleged lien were sued out before the act of 1870 was passed, and the *fi. fa.* was issued on the fiat of the judge, as by the statute was then required. Plaintiff, on the trial, amended both the fiat and the execution, by striking out from both a large amount of the debt claimed. The court held that by this amendment the levy, under section 3495 of the Code, must fall. We do not think that under the facts the court erred. That section provides in terms that if the *fi. fa.* be levied at the time the amendment is made, "the levy must fall, still the amended

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fi. fa. may be re-executed." We see no way to except this *fi. fa.* from the operation of that section. As, however, only a portion of the property levied on was claimed, the order of dismissal should have been limited to that portion, and it was so directed in the judgment we rendered to be sent back in the remittitur.

3. There was no necessity for either of the motions that were subsequently made by the plaintiffs. If they had obtained a new trial by judgment of the court which tried the case, or by writ of error to this court, the securities on the claimant's bond would have still been bound by the final judgment, and the insolvency of the claimant was not a matter to affect the question. An insolvent claimant, if he has a good bond, is entitled to all the rights of a solvent one, and the motions, if they had been proper and had been granted, would not have furnished any additional security to what the plaintiffs already had, for the same sureties then on claimant's bond would have been sufficient on any new bond.

Judgment affirmed, with directions.

JOHN HIGHFIELD *et al.*, plaintiffs in error, vs. ZEBULON T. PHELPS *et al.*, defendants in error.

[TRIPPS, Judge, was providentially prevented from presiding in this case.]

If one of the attesting witnesses to a deed be a magistrate, the conclusion of law is that he saw the instrument legally executed—that is, signed, sealed and delivered, so as to authorize the same to be admitted to record.

Deed. Witness. Presumption. Registry. Before Judge STROZER. Randolph Superior Court. May Term, 1874.

For the facts of this case, see the decision.

B. S. WORRILL, for plaintiffs in error.

A. HOOD, for defendants.

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WARNER, Chief Justice.

This was an action of ejectment, brought by the plaintiffs against the defendants, to recover possession of lot of land number two hundred and seventy-three, in the fifth district of Randolph county. On the trial of the case, the plaintiffs offered in evidence a deed from one Higgins, made under a power of attorney, and which had been recorded, as a part of his chain of title. The defendants objected to the admission of this deed in evidence, on the ground that it was not legally probated so as to authorize the same to have been admitted to record, which objection was sustained by the court, and the plaintiffs non-suited; whereupon the plaintiffs excepted.

The attestation clause of the deed recited, "In witness whereof, I have hereunto affixed my seal and assigned my name, in the presence of," etc., which was attested by Charles Mitchell and N. H. Pendergrast, justice of the peace, as witnesses. A deed to land executed in this state must be attested by at least two witnesses, and if one of the attesting witnesses is a justice of the peace or a notary public, that will entitle the deed to be recorded. The objection to the attestation clause in this deed is, that it does not recite that it was *delivered*. In *Dinkins vs. Moore*, 17 *Georgia Reports*, 62, it was held that if one of the attesting witnesses to a deed be a magistrate, an officer appointed by the law to perform this duty, the conclusion of law is, that he saw the instrument legally executed—that is, signed, sealed and delivered, so as to authorize the same to be admitted to record. This deed offered in evidence by the plaintiffs having been recorded on the attestation of a justice of the peace, and one other witness, it was error in the court in rejecting it at the trial.

Let the judgment of the court below be reversed.

JAMES H. BURNS, plaintiff in error. *vs.* ANDREW M. PARKS, administrator *de bonis non*, defendant in error.

B. was security on a note payable to G. and was also executor on the estate of his principal. G. having obtained judgment on his debt caused a levy to be made on the property of the estate. B. filed a bill of injunction and to marshal the assets. A decree was taken in 1869 reciting that it was by consent of all parties, creditors and heirs, and directing, among other things, the payment of a certain proportion of the debts, except that of G., which was stated in the decree to be a slave debt, and out of the jurisdiction of the court. A levy was afterwards made on the individual property of B., who filed an affidavit of illegality, setting up the foregoing facts, and that he had sold the property of the estate, paid what was going to creditors, and divided the balance with the heirs, and claiming that he was thereby discharged as security. B. was one of the heirs :

Held, that B. was not discharged.

- Principal and security. Jurisdiction. Slave debt. Before J. J. FLOYD, Esq., Judge *pro hac vice*. Jackson Superior Court. February Term, 1874.

On the fourth day of March, 1867, William M. Gathright, as administrator upon the estate of C. C. Potts, deceased, recovered a judgment in Jackson superior court, against James H. Burns, as executor of David M. Burns, deceased, principal, and James H. Burns, security, for \$1,188 30, principal, and \$442 10 interest to the date of judgment, with accruing interest and costs. On November 26th, 1873, the execution based on the aforesaid judgment, was levied upon certain lands as the property of James H. Burns, security. He filed an affidavit of illegality setting up the following facts:

By a decree of the superior court of Jackson county, rendered in the case of this defendant, as agent and receiver of the estate of David M. Burns, deceased, against William M. Gathright, administrator, John S. Hunter, deputy sheriff, John H. Newton *et al.*, creditors of the said David M., deceased, which was a bill to marshal assets and for injunction, and in the case of Lamar Cobb *et al.*, creditors of the said David H., against this defendant, as agent and receiver as

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aforesaid, which was a creditor's bill, to both of which the plaintiff was a party, it was declared that the judgment upon which said execution was based, was for the purchase money of a slave or slaves, and the court being, under the constitution of the state, without jurisdiction thereof, could not make any allowance out of the assets of the estate to be paid thereto. The plaintiff was present in court when this decree was rendered, and consented thereto. This transpired on September 1st, 1869, during the August term of the superior court. This decree has been fully executed by this defendant, as receiver, by the sale of some of the property of David M. Burns, deceased, and the payment of the proceeds to the creditors, according to the terms thereof. What portion of said estate was not sold was divided among the heirs-at-law. Therefore, should this defendant pay plaintiff's claim, he would have no remedy against the estate of the principal. The plaintiff having failed to prosecute his claim against the estate of the principal by excepting to the decision of the court rendering said decree within the time prescribed by law, the debt against said estate having become thereby extinguished, the obligation of this defendant, as security, has also become extinct.

To the affidavit was attached a copy of the decree therein referred to. It purported to be by consent of all parties interested, and to dispose of all the litigation in reference to the estate of David M. Burns. It established rules by which all the assets were to be distributed. The claim of plaintiff was excluded for the reason set forth in the affidavit of illegality.

Upon demurrer, the illegality was dismissed, and defendant excepted.

William C. Gathright, administrator, having died pending the litigation, Andrew M. Parks, administrator *de bonis non*, was made a party in his stead.

SPEER & THOMAS; WILL. J. PIKE, for plaintiff in error.

J. B. ESTES, for defendant.

TRIPPE, Judge.

It would scarcely be claimed that if the decree had been taken by consent of all parties, allowing other judgment creditors of the estate to take the whole assets, on the ground that they had a priority, the security would thereby have been discharged, had it turned out to be the fact, as ascertained afterwards, that such priority did not exist. If a plaintiff in execution, which has been levied on personal property of the principal, dismiss the levy by the consent of the surety, it does not operate a discharge of the surety. It would be difficult to conceive of anything which a creditor could do that would release the surety, when it was done by the surety's consent. If there be fraud, artifice or deception, practiced by the creditor, the question would be different. The consent decree in this case does not vacate or set aside the judgment or execution in favor of the plaintiff. Its legal effect is simply that it could not be enforced against the assets of the estate, the ground assigned therefor, by consent of parties, being that the consideration of the debt was a slave. The reason for the decree is not a good legal reason; but both parties consented that it should be taken—the surety as well as the creditor. It is no more than if the assets had been decreed to be paid to some other creditor, on some ground which the parties thought gave it priority, but which really did not. Besides, the surety took a benefit by this decree. He was an heir-at-law of the party for whom he was security. By consenting with this creditor that his debt could not be enforced against the estate, his share therein was increased. It would be hard that a surety, who had assets of his principal in his hands, could set up that they were not subject to the debt for which he was bound, and then claim that because the creditor concurred with him, and he had paid them out, he was thereby discharged; and especially where his share in such assets was greater by setting up and sustaining such defense than it otherwise would have been.

Judgment affirmed.

King vs. Loudon.

JOHN KING, plaintiff in error, vs. JOHN LOUDON, assignee,
defendant in error.

Where, within four months after the levy of an attachment, the defendant was adjudged a bankrupt, and the plaintiff, notwithstanding, proceeded to take a judgment on the attachment, it was not error in the judge, on motion of the assignee, to declare the attachment dissolved; nor was it necessary, in a case when the property levied on had, before the adjudication in bankruptcy, been, by order of the court, sold to prevent waste, and turned into money, that the assignee should, before the attachment was dissolved, formally disclose to the court that he wished to demand the fund arising from the sale. The dissolution of the attachment is simply the declaration upon the minutes, on information to the court of the adjudication of bankruptcy, of the legal effect of such bankruptcy.

Bankrupt. Attachment. Before Judge JAMES JOHNSON.
Muscogee Superior Court. November Term, 1873.

Loudon, as assignee of the Empire Cotton Seed Huller and Oil Company, moved to dissolve an attachment against said company in favor of John King, upon the following statement of facts:

The attachment was levied on May 14th, 1872. The defendant was adjudged a bankrupt by the district court of the United States for the southern district of New York, on July 2d, 1872. On June 14th, 1872, the property levied on was sold under an order of Judge Johnson, issued at chambers, on June 3d, 1872, and the proceeds directed to be held subject to the order of the court to which the attachment was returnable. At the November term, 1872, King recovered a judgment on said attachment. On May 28th, 1873, during the May term of the court, John Loudon, as assignee of said bankrupt, moved to dissolve said attachment. He had made no claim to the fund arising from the aforesaid sale. At the November term, 1873, when said motion came on in its order to be heard, the court dissolved the attachment, and King excepted.

PEABODY & BRANNON, for plaintiff in error.

R. J. MOSES, for defendant.

MCCAY, Judge.

The bankruptcy of the defendant, by the express and positive terms of the bankrupt act, dissolved the attachment, and the judgment thereon afterwards taken was void. We are not prepared to say that the sale of the property by the court stood upon the same footing. The property was in its custody legally. If the bankruptcy dissolved the attachment, the court was still the custodian of the property, and might, it would seem, to prevent the waste of it, order it sold and take care of the proceeds. If the defendant was, in fact, a bankrupt, on that fact being officially made known to the court, it was the duty of the court to declare the attachment dissolved; and we think the assignee a proper party to bring the fact of bankruptcy before the court. It was not proper to put him upon terms in this respect. The only object he sought was to notify the court of the bankruptcy. *Ipsa facto*, the bankruptcy dissolved the attachment, and the only necessity for any action by the state court was to make its own records perfect. The assignee sought no action—no judgment of the court.

We do not decide what was the effect of the sale. We incline to think it was good, if the seizure was prior to the bankruptcy. The property being in the custody of the court, it was its duty to take care of it until the assignee asserted his title, and a sale of it was, perhaps, the only way to preserve it. It is only to prevent waste that such sales on *mesne* process are justified. The sale in such cases is doubtless good, even though the plaintiff fail in his suit. The remedy of the defendant is on the bond. We think there was no error.

Judgment affirmed.

JAMES M. COOK, plaintiff in error, vs. WILLIAM N. L. CROCKER, defendant in error.

1. A vendee holding a bond for titles, but not entitled to possession of the land, on representing his inability to pay for the land, and asking for a rescission of the contract, was told by his vendor that on his paying \$400 00—which was a little over one-third of what was to become due in two days—he could have possession and “ample time to pay the balance.” The payment was made, and the vendee went into possession. Fifteen months afterwards suit was brought for the balance of the purchase money:

Held, that the vendee could not defend on the ground that the action was a violation of an agreement for indulgence.

2. A vendee who has made a partial payment for land, and made improvements on the same, cannot, on account thereof, set up a claim to a homestead in any part of the land, against a suit for the balance of the purchase money. Nor is the question affected by the fact that the land, with the improvements, has depreciated in value below the amount of such unpaid balance.

3. Where there can be no dispute as to the amount due, and the finding of the jury is for “the principal with interest and cost,” it is not error for the court to permit the principal of the note sued on to be inserted in the verdict. Especially when it is done in the presence of the jury, and they, on being directed to retire and reconsider the case, do, after such reconsideration, return the verdict as amended.

Bond for titles. Contracts. Homestead. Verdict. Practice in the Superior Court. Before Judge KIDDOO. Sumter Superior Court. October Adjourned Term, 1873.

Crocker brought complaint against Cook on two notes dated October 31st, 1870, the first for the sum of \$1,000 00, payable to the plaintiff, or bearer, by December 25th, next thereafter, with a credit thereon of \$400 00, of date December 23d, 1870; the second for \$1,100 00, payable by December 25th, 1871.

The defendant filed an equitable plea, setting up the following facts:

The notes sued on were given for lot of land two hundred and three, in the twenty-sixth district of Sumter county, the defendant receiving a bond conditioned to make titles on the payment of the same. Shortly before the first note became

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due, the defendant discovered that he would not be able to meet the same, and so informed the plaintiff, and requested him to rescind the contract. This the plaintiff refused, but promised that if the defendant would pay him \$400 00 he might take possession of the land and "have ample time to make payment of the balance." He, at the same time, stated to the defendant not to be uneasy, but to go ahead and do the best he could. On the faith of these assurances the defendant paid the \$400 00, took possession of the premises and proceeded to improve the same. He has paid taxes upon said property amounting to \$40 00. The rent of the place, including the present year, was not worth exceeding \$500 00, if that amount. He has made improvements thereon to the amount of \$625 00. The price agreed upon at the time of the purchase was exorbitant. Owing to the depreciation of real estate and the scarcity of currency, said lot is not now worth exceeding \$1,200 00. The property, if sold during the approaching spring or summer, would not bring even that amount. He has made all his business arrangements to plant said lot during the present year. It is the only source of revenue for himself and family. Has filed his petition for a homestead in the same, which is now pending. He, therefore, prays that the verdict of the jury be moulded so as to allow to him and his family the use of said premises during the present year; that the contract of sale be rescinded, and the evidences thereof canceled; that the plaintiff be decreed to return to the defendant the said \$400 00, and such other amount as defendant may be entitled to for improvements; and that defendant deliver possession to the plaintiff at the end of the present year. Or that it be decreed that defendant's interest in the land be ascertained and allowed as a homestead for him and his family.

On demurrer, the aforesaid plea was stricken and defendant excepted.

The jury found for the plaintiff "principal, interest and costs." The court, over the objection of defendant, instructed counsel for plaintiff to insert in said verdict the amount of

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the principal. This was accordingly done, and the jury instructed to retire to their room and ascertain if the amount interlined was correct. They returned into the court-room with the verdict as altered.

To this action on the part of the court defendant excepted.

Error is assigned upon each of the aforesaid grounds of exception.

JOHN R. WORRILL; GUERRY & SON, for plaintiff in error.

B. P. HOLLIS, for defendant.

TRIPPE, Judge.

1. The vendee was not entitled to possession until he paid the vendor the sum of \$1,000 00. The contract of purchase and sale was absolute. Notes for the purchase money were given, dated October 31st, 1870, and the first, for \$1,000 00, was due December 25th, 1870. The purchaser had no legal right to demand a rescision of the trade, nor did he make any proposition to the plaintiff which he was bound to accept. Two days before the first note was due, the vendor told him he could go into possession then if he would pay \$400 00, and should have ample time to pay the balance. The payment was made and possession delivered. Suit was brought on the note fifteen months afterwards. If giving possession and an indulgence of fifteen months on the balance of \$600 00 due on the debt was not amply complying with the agreement, and a satisfaction for the payment of \$400 00 two days before it was due, it would be hard to conceive what would be. Besides, it does not appear that the payment of the \$400 00 *two days before it was due*, was made a consideration of the promise. The interview between the parties seems to have been at the instance of the purchaser, and from the terms of the plea it rather appears that instead of the two days being a part of the contract or in any way affecting it, the proposition was that if, instead of paying the \$1,000 00, according to the terms of the note and bond, the debtor would pay

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\$400 00, he should have possession, and the indulgence promised was a gratuity. If the note had been due on the 23d of December—the day the \$400 00 was paid—instead of the 25th, then there could have been no consideration for the promise. We do not construe the plea to say that the payment of the money in advance of its being due, was a part of the contract, but it resulted from the fact that the purchaser happened to have the interview on that day. What would have been the law of the case provided there had been a contract for indulgence for a valuable consideration, it is not necessary to say.

2. The whole land sold—especially if it be in one body and for a specific price, and bond for titles be given—is bound for the payment of the purchase money, and the purchaser, on account of a partial payment, has no right to claim a homestead in the land to that extent, or in the proportion which the payment bears to the whole purchase money. Nor does the fact that the purchaser has made improvements on the land, and that it has depreciated in value below the amount of the unpaid balance, affect the question. The vendor does not warrant against depreciation. The purchaser risks that. If the land advances in value it is his gain, if it declines he suffers the loss.

3. There was no error in the court in permitting the verdict to be corrected or amended under the facts of the case: See *Jackson vs. Jackson*, 40 *Georgia*, 153, and *Doster & Turner vs. Brown & Warner*, decided at the present term.

Judgment affirmed.

RANDAL THOMAS, plaintiff in error, vs. JAMES S. JOHNSON,
deputy sheriff, defendant in error.

An execution was levied on cotton by the sheriff; on the day of the levy, by agreement of plaintiff and defendant in *ft. fa.*, the cotton was turned over to the former to be credited on the execution. About five days after this transaction, notice was given to the sheriff by an attor-

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ney for another plaintiff in *fi. fa.* not to pay over the proceeds of the sale of the cotton to the owner of the execution first levied, as he claimed it on a *fi. fa.* of superior dignity:

Held, that a rule against the sheriff at the instance of the second plaintiff in execution was properly discharged.

Sheriff. Rule against officer. Execution. Before Judge POTTLE. Ogleshorpe Superior Court. April Term, 1874.

For the facts of this case, see the decision.

J. D. MATHEWS, by brief, for plaintiff in error.

LUMPKIN & OLIVE, by brief, for defendant.

WARNER, Chief Justice.

This was a rule against the sheriff calling upon him to show cause why he should not pay the amount of Thomas' *fi. fa.* The sheriff, in his answer to the rule, (which was not traversed,) states that he levied a *fi. fa.* in favor of Stokely upon some seed cotton as the property of Brittain, the defendant therein; that on the same day the levy was made, Stokely's agent being present, the cotton was, by agreement of the defendant and plaintiff's agent, turned over to the plaintiff, the same to be credited on plaintiff's *fi. fa.* About five days after this transaction, Thomas' attorney notified the sheriff not to pay over the proceeds of the sale of the cotton to Stokely, as he claimed it on a *fi. fa.* in favor of Thomas against Brittain, the defendant, of superior dignity. This notice was not accompanied by the execution, and was given five days after the cotton levied on had been, by the consent of the parties, turned over to the plaintiff in *fi. fa.* to be credited thereon, the sheriff having no notice of Thomas' *fi. fa.*, as the same was never placed in his hands for collection. The court, on hearing the answer of the sheriff, discharged the rule, and the counsel for Thomas excepted.

We find no error in the ruling of the court, on the statement of facts disclosed by the answer of the sheriff. The defendant in the Stokely *fi. fa.* had the unquestionable right

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to pay it either in money or in seed cotton, if the plaintiff was willing to accept the cotton in payment thereof. If the cotton levied on paid the *fi. fa.* placed in the sheriff's hands for collection, that was a satisfaction of it, at least to the value of the cotton which the plaintiff consented to receive, and the sheriff would not be liable to other parties unless their claims had been in his hands at the time. If Thomas' *fi. fa.* was, in fact, of superior dignity to Stokely's, and had been in the sheriff's hands at the time of the alleged settlement of Stokely's *fi. fa.* by the defendant, it would have presented a different question.

Let the judgment of the court below be affirmed.

EDWIN P. WILLIAMS, plaintiff in error, vs. THOMAS J. DOOLY, administrator, defendant in error.

Williams gave his written promise to pay by a given date to T. J. Dooly, as administrator of L. J. Dooly, \$451 00, adding thereto "which is to be discharged and paid in notes and demands I hold against the estate, to the extent and as far as the estate is sufficient to pay the debts thereof:"

Held, that Williams was not bound to tender the notes and demands he held against the estate to the administrator on the day his contract matured, or forfeit all rights under it. By the contract the claims were so connected with the debt created by it, as to entitle Williams to a credit of such sum as he had a right to claim out of the estate, whenever the same could be ascertained.

Contracts. Administrators and executors. Tender. Before JASPER N. DORSEY, Esq., Judge *pro hac vice*. White Superior Court. October Adjourned Term, 1873.

Thomas J. Dooly, as administrator upon the estate of Linsey J. Dooly, deceased, brought complaint against Edwin P. Williams, upon the following note:

"\$451 00. By the sixth day of November next I promise to pay Thomas J. Dooly, as administrator of the estate of Linsey J. Dooly, deceased, four hundred and fifty-one dollars,

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which is to be discharged and paid in notes and demands which I hold against the estate, to the extent and as far as the estate is sufficient to pay the debts thereof. This 12th January, 1867. (Signed) E. P. WILLIAMS."

The defendant pleaded that the estate of Linsey J. Dooly, deceased, was entirely solvent. That at the time of the making of the note sued on, and since, he held claims against said estate to the amount of \$1,000 00, which he pleads as a set-off, and prays judgment for the surplus; that he has ever been willing to discharge said note in said claims, and has repeatedly offered plaintiff so to do; that after said note matured, to-wit: on December 30th, 1869, the plaintiff consented to accept the claims aforesaid in payment of said note, and agreed to meet this defendant at his house, in White county, in order to effect said settlement, but failed to keep the appointment.

To the plea was attached a schedule of the claims held by the defendant.

Upon demurrer the plea was stricken and defendant excepted. Judgment was then rendered by the court in favor of the plaintiff.

Error is assigned upon the above ground of exception.

C. H. SUTTON; WIER BOYD, for plaintiff in error.

J. B. ESTES, for defendant.

TRIPPE, Judge.

We do not think that the strict law of tender applies to a contract like this. It rather, by its terms, was an agreement that the claims which the maker of the note held against the intestate should be a mutual debt, so far as it concerned that note, and so far as the estate was sufficient to pay those claims. It did not give the defendant below an absolute right to discharge his debt by the tender or delivery of certain things, or any certain amount of "notes and demands." The right was qualified with the condition that they were to be paid

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"to the extent, and so far as the estate is sufficient to pay the debts thereof." In *McDaniel, administrator, vs. Hooks*, 30 *Georgia*, 981, it was held that when an administrator, in selling land which is encumbered with a vendor's lien, agrees with the purchaser before the sale, to take up the lien, he is bound to allow the lien in settling with the purchaser. That case was a suit at law on the purchaser's note given for the land. The defendant proposed to prove by one Munroe that pending the sale he, Munroe, told the defendant that he held a note on Shiver, the deceased, given for the same lot of land, and that it was agreed if the defendant became the purchaser at the sale, and would take up the note from Munroe, that the plaintiff would accept it as a credit or payment on the note sued on, as far as it would go; that pursuant to agreement, Hooks, the defendant in the case, purchased the note from Munroe. This court held that the administrator was bound to allow the credit in settling with the purchaser. The note was pleaded as a set-off. In that case it was a verbal contract, here it is in writing, and made a part of the note sued on, that the plaintiff will receive whatever amount of notes and demands the maker holds on the estate to the extent it is sufficient to pay. We think there was error in dismissing the plea of defendant.

Judgment reversed.

FREDERICK REICH, plaintiff in error, vs. THE STATE OF
GEORGIA, defendant in error.

1. A plea in abatement to an indictment, that the witnesses on which the indictment was found, were not sworn in open court, and that they did not take the proper oath, is not a good plea, especially if it is not stated what the names of the witnesses were, nor what oath was taken.
2. It is a good special plea to an indictment, if made on arraignment, that one of the grand jurors who found the indictment or special presentment, was an alien and not qualified to sit as a grand jurymen.
3. The city council of Columbus has no jurisdiction to try one for a vio-

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lation of the statute against keeping open a tippling house on the Sabbath day, and a conviction for such an offense before such city council, is no bar to an indictment in the superior court.

Criminal law. Indictment. Grand Jury. Witness. Aliens. Municipal corporations. Jurisdiction. Before Judge JAMES JOHNSON. Muscogee Superior Court. May Term, 1874.

Reich was presented for the offense of keeping open a tippling house on the Sabbath day. On arraignment he pleaded as follows:

1st. That on September 9th, 1873, he was taken before the mayor of the city of Columbus, charged with the same offense as is set out in the presentment, and convicted of the same; that said judgment remains in full force.

2d. That A. Cadman, one of the grand jurors who made the presentment, was not at that time a citizen of Georgia, but was then a subject of Great Britain.

3d. That the witnesses, upon whose testimony said presentment was found, were not sworn by or before the court; that if any oath was administered to them it was not an oath in these words: "The evidence you shall give the grand jury on this presentment, the state of Georgia against F. Reich, shall be the truth, the whole truth, and nothing but the truth, so help you God."

On demurrer, said pleas were stricken, and defendant accepted. He then pleaded guilty.

Error is assigned upon the above grounds of exception.

H. L. BENNING; M. H. BLANDFORD; C. R. RUSSELL, for plaintiff in error.

W. A. LITTLE, solicitor general, by PEABODY & BRANNON, for the state.

McCAY, Judge.

1. These pleas as to the oath of the grand jurymen are entirely too uncertain. They do not say what witnesses they refer to, nor do they point out in what the oath was defective.

Pleas ought always to present matter on which issue may be taken, and should contain such a statement as will notify to the opposite party what he has to meet.

2. We think the plea that one of the grand jurors was not a citizen, is a good plea. Section 3916 of the Code clearly contemplates that a grand jurymen must be a citizen, and whilst the constitution does not, in terms, require it, and only uses the word "persons," yet there is nothing in this inconsistent with the Code; and this has long been the law of this state. It was also the common law: 1 Chitty C. L., 307; 5 Bacon Ab., 312; 1 Bishop Criminal Law, 795; 3d Coke Inst., 34; 9 Texas, 65; 5 Porter, Ala., 484. So, too, we think the objection may be taken by special plea. There are some authorities seemingly to the effect that the challenge must be to the jury before bill filed; but it seems to us that this is unreasonable. How is a defendant to know that this secret inquest is proceeding to find a bill against him? Whatever objections there may be to a grand juror that a party can make, ought (and this has always been the practice in this state,) to be made on the trial, and before pleading to the merits, and such, we think, was the practice in England: 1 Chitty C. Law, 307; Bacon Ab., Juries (*a.*) 727.

3. The power to punish for selling without license does not, in our judgment, include the power to punish for keeping open doors on Sunday. This may be committed though the offender have license, and the offense may be committed without any selling at all. The crime or misdemeanor consists in the offense the act gives to good citizens, and the breach of the quiet and orderly customs of the day. It is a special offense, under the Code, and the power to punish for it having been assumed by the state, it does not belong to the city. The trial for the offense before the city court was, therefore, illegal. The offense was a crime against the state, and not a mere breach of the city ordinances.

Judgment reversed on the ground as to the alien grand jurymen.

Durand vs. Williams.

SAMUEL A. DURAND, plaintiff in error, vs. FREDERICK A. WILLIAMS, defendant in error.

Where an action was commenced on February 28th, 1873, on a covenant of warranty contained in a deed made in June, 1863, and it appeared that at the time of the execution of said conveyance by the defendant, the land was in possession of a third person under paramount title thereto, such suit was barred by the provisions of the act of March 16th, 1869.

Statute of limitations. Warranty. Before Judge HOPKINS. Fulton Superior Court. April Term, 1874.

For the facts of this case, see the decision.

L. J. WINN, for plaintiff in error.

W. H. DABNEY, by brief, for defendant.

WARNER, Chief Justice.

The plaintiff brought an action of covenant against the defendant, on a warranty contained in a deed made by the defendant to him for a certain described tract of land mentioned therein, which deed was executed in June, 1863. It appears from the evidence in the record that at the time the deed was executed by the defendant to the plaintiff, one Powell was in possession of the land under a paramount title thereto—the plaintiff had sold the land and made a warranty deed to his vendee. The plaintiff being examined as a witness, stated that he did not know that Powell or any one else was in possession of the land, until after he sold it. The defendant pleaded the statute of limitations of 1869 in bar of plaintiff's right to recover. The action was commenced 28th February, 1873. There had been a recovery against the plaintiff by his vendee, on his covenant of warranty to him for a breach thereof, in October, 1872. The court charged the jury "that if it appears from the evidence that the plaintiff purchased of the defendant the land described in his declaration, and made him a warranty deed therefor, as averred in the declaration, prior to June 1st, 1865, and at the time of the purchase the land

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was in the actual possession of another, under a paramount title, and it further appears that this suit was not instituted until after January 1st, 1870, the plaintiff's cause of action would be barred, and he would not be entitled to recover." To which charge the plaintiff excepted.

The question made by the record in this case is as to the time when the plaintiff's right of action accrued. The plaintiff in the court below, and plaintiff in error here, insists that his right of action against the defendant did not accrue until the recovery was had against him for a breach of his covenant of warranty by his vendee. That undoubtedly would have been so had there not have been a breach of the covenant at and before the conveyance of the plaintiff's title to his vendee. When Williams conveyed the land to Durand, the present plaintiff, there had been a breach of the covenant of title, and that covenant was broken at the time it was made, in 1863. Durand's cause of action for a breach of the covenant contained in Williams' deed accrued to him then. The deed of Durand to his vendee conveyed nothing more than a broken covenant. He was not seized of the land at the time he conveyed it, and not being seized of the land at the time of his conveyance, he could convey nothing but a mere *chose* in action. If Williams had been legally seized of the land at the time he conveyed it to Durand, and Durand had been legally seized of it at the time he conveyed to his vendee, then it would have been altogether a different question. The covenant for seizin being broken at the time of its execution by Williams to Durand, it was a mere right of action, incapable of assignment to his vendee as a covenant of seizin running with the land. When Durand executed his deed to his vendee, he had no title to the land to convey to him, and he was not seized of any land to which any covenants of warranty running with it could attach. The right to sue for a breach of Williams' covenant in his deed was in Durand, and that right accrued to him in 1863, which was prior to the 1st of June, 1865, and comes within the provisions of the 3d section of the limitation act of 1869.

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The plaintiff, in contemplation of the law, will be presumed to know who was in possession of the land purchased and conveyed by him; at least, actual possession thereof by another would be notice to him. In the case of *George vs. Gardner*, 49 *Georgia*, 441, we held that the act of 1869, allowing nine months and a half within which plaintiffs should institute their suits, was not so unreasonably short as to make that act unconstitutional.

In view of the facts disclosed by the record in this case, we find no error in the refusal of the court to charge as requested, or in the charge as given.

Let the judgment of the court below be affirmed.

ABRAM GAMMELL, plaintiff in error, *vs.* RANDOLPH M. MULFORD *et al.*, defendants in error.

The assignee of an execution has the same right to enforce it by levy and sale as had the plaintiff, and when A held, as plaintiff, an execution against a copartnership, and therefore against each partner, and there was no partnership property, and had levied it upon the property of B, one of the partners, and C, a kinsman and friend of B, bought the execution, and took a transfer of it to himself, and dismissed the levy on the property of B, and had the execution levied on the property of D, the other partner:

Held, that the transferee was in this only pursuing a legal right, and that equity would not, on the complaint of D, setting up that he had paid more than his share of the debts of the firm, and that B, the other partner, was solvent, restrains the levy. The property of both partners is bound by the judgment, and the creditor may proceed at his option against either, notwithstanding there may be equities in favor of the one proceeded against, so far as his partner is concerned.

Injunction. Partnership. Executions. Before Judge JAMES JOHNSON. Muscogee county. At chambers. August 1st, 1874.

Abram Gammell filed his bill against Randolph L. Mott and Randolph M. Mulford, praying that the latter might be enjoined from enforcing two executions against the individ-

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ual property of complainant. The grounds upon which the injunction was sought are succinctly stated in the above head-note, and it is unnecessary to repeat them here. The chancellor refused the injunction, and complainant excepted.

PEABODY & BRANNON, for plaintiff in error.

INGRAM & CRAWFORD, for defendants.

McCAY, Judge.

The act of 1829, Prince's Digest, 464-5, providing for the transfer of unpaid judgments, authorizes the transferee to proceed to collect the same in as full and ample a manner as the plaintiff could have done. The right of a plaintiff who has a judgment against more than one person to proceed against either or both at his option, is a statutory right. His judgment is complete against either of the defendants. It is a stern, strict legal right, and the equities that may exist between the defendants, cannot, and ought not, to interfere. He has a complete judgment, as we have said, against both and each, and neither can complain that he is proceeding to enforce his strict, stern legal right. To allow such a proceeding as is here proposed would open the door to vexatious delays, largely interfering with the rights of judgment creditors, and we do not hesitate to affirm the judgment.

Judgment affirmed.

WILLIAM H. STRICKLAND, sheriff, plaintiff in error, vs.
HALSTED SMITH, defendant in error.

A mere notice to the sheriff to retain money collected under legal process, unless accompanied by some lien claiming it, will not justify him in withholding it from the plaintiff under whose process he received it.

Sheriff. Executions. Lien. Before Judge SCHLEY. Bryan Superior Court. April Term, 1874.

For the facts of this case, see the decision.

CHARLES N. WEST, by R. H. CLARK, for plaintiff in error.

MELDRIM & ADAMS; HALSTED SMITH, for defendant.

WARNER, Chief Justice.

This was a rule against the sheriff of Bryan county, calling on him to show cause why he should not pay to Halsted Smith the sum of \$372 99. From the sheriff's answer, the following facts were admitted by him to be true: That he had an execution in his hands for collection in favor of Poindexter against Henry E. Smith, for about \$500.00; that he collected the money due on the execution, and paid the same over to the plaintiff's attorney therein; that whilst the execution was in his hands for collection, the plaintiff, Halsted Smith, notified him, in writing, that he held a claim against Poindexter, and had sued out an attachment against him as a non-resident of the state, and had garnished Henry E. Smith, and also notified him to retain the money which he should collect on the *fi. fa.* in favor of Poindexter against Henry E. Smith, until the November term of the superior court. On this statement of facts the court made the rule absolute against the sheriff for the amount of plaintiff's claim against Poindexter, the defendant in attachment; whereupon, the sheriff excepted.

In our judgment, the court erred in making the rule absolute against the sheriff, on the statement of facts contained in the record. The sheriff was not bound to retain the money in his hands, collected from Henry E. Smith in favor of Poindexter, on the mere notice of Halsted Smith for the payment of his debt, unaccompanied by any lien on the money. The notice was no lien on the money in the sheriff's hands; in fact, the plaintiff, at the time of giving the notice, had not obtained judgment on his attachment, and, as the record shows, did not do so until April, 1874. A mere notice to a sheriff to retain money in his hands, collected by him under legal

Christmas vs. The State of Georgia.

process, without such notice is accompanied by the lien claiming it, will not justify the sheriff in doing so, or excuse him from paying twenty per cent., if the money should be demanded of him by the plaintiff in *fi. fa.*, under the statute.

Let the judgment of the court below be reversed.

NATHAN CHRISTMAS, plaintiff in error. vs. THE STATE OF
GEORGIA, defendant in error.

(TRIPPE, Judge, was providentially prevented from presiding in this case.)

The finding of "no bill" by two successive grand juries, on a bill of indictment for a crime, does not entitle the person charged, to an order upon the minutes of the superior court discharging him "from offense or crime therein contained."

Criminal law. Before Judge HARRIS. Dooly Superior Court. March Term, 1874.

Counsel for Christmas proposed to take the following order:

"THE STATE vs. NATHAN CHRISTMAS.

"September Term, 1873. Indictment for assault with intent to rape, and no bill by the grand jury.

"THE STATE vs. NATHAN CHRISTMAS.

"Indictment for assault and battery, March Term, 1874, and no bill.

"It appearing to the court that the above bills charge the defendant in the same transaction, and on the same day, with the same offense in law, and that two successive grand juries have ignored the respective bills, it is ordered by the court that the defendant be discharged from the offense or crime therein contained, and go hence without a day."

The court refused to allow the order, and Christmas excepted.

W. A. HAWKINS; W. W. BROWN; PHIL. COOK, for plaintiff in error.

ROLLIN A. STANLEY, solicitor general; C. T. GOODE, by brief, for the state.

Blun & Sterne vs. Holitzer.

McCAY, Judge.

Under the facts stated in the judge's certificate, to-wit: that on this application being made, the solicitor general replied that he was about to present another bill, and that he expected to prove the two "no bills" had been procured by the fraud of the defendant, we think it was eminently proper in the judge to refuse the order asked for. But we do not think the order was a proper one had there been no such statement by the solicitor general. The Code does not contemplate that two "no bills" shall entitle the person charged to a judgment of acquittal, or to a discharge from the crime. It simply provides that they "shall be a bar to another indictment, unless they have been procured by the *fraudulent conduct* of the person charged, on proof of which or of *newly discovered* evidence, the judge *may allow* a third bill to be presented, found and prosecuted:" Code, 4708. This is a very different thing from an acquittal or final discharge by a judgment of the court. The two returns of no bill are on the minutes; they stand there for what they are worth, and whatever may be their legal effect they need no new order or judgment of the court. Perhaps on two such returns a prisoner might be discharged from arrest; but the order sought here is for more than that, and would, perhaps, if granted, bar the third indictment, even under the conditions provided for.

Judgment affirmed.

BLUN & STERNE, plaintiffs in error, vs. LOUIS HOLITZER,
defendant in error.

Where the plaintiff was employed for one year, at a stipulated sum per month, but was discharged before the expiration of his term, and thereupon sued and obtained a judgment for the amount due up to the time of such discharge, he is not thereby estopped from instituting proceedings to recover the balance due him for the remaining portion of the year.

Contracts. Estoppel. Before Judge STROZER. Dougherty Superior Court. April Term, 1874.

For the facts of this case, see the decision.

D. H. POPE, for plaintiffs in error.

SMITH & JONES; R. F. LYON, for defendant.

WARNER, Chief Justice.

The plaintiff sued the defendants on an open account for his services as clerk, and on the trial of the case the jury found a verdict for the plaintiff for \$275 00. A motion was made for a new trial, on the grounds that the verdict was contrary to the evidence, and without evidence, that it was contrary to law, and contrary to the charge of the court; which motion was overruled, and the defendants excepted. The evidence in the record shows, that in September, 1871, the defendants employed the plaintiff as a clerk for one year, and were to give him \$40 00 per month and board him. In April, 1872, the defendants discharged the plaintiff from their employment because their business was dull, and for no other reason, so far as the record shows. The plaintiff then sued the defendants for what was due him for his wages up to that time, and recovered a judgment therefor. The present action is brought to recover his wages for the balance of the year after his discharge. The defendants contend that he cannot do that, because he treated the contract as rescinded, and brought his suit for what was due him up to the time of his discharge from their employment. This depends on the construction to be given to the 2726th section of the Code, which declares that in some cases even an entire contract is apportionable, as where the price to be paid is not fixed, or is by the contract itself apportioned according to time, so if the failure of one party to perform is caused by the act of the other, the contract may still be apportioned. In this case, according to the evidence in the record, the defendants were to pay plain-

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Chancy vs. Carrigan.

tiff \$40 00 per month for one year, so that by the contract itself, there is no difficulty in apportioning the amount for which the plaintiff was entitled to recover, under the contract, for the time he served the defendants as their clerk, or for the time they prevented him from serving them by discharging him before the expiration of the year for which he was employed. In our judgment, the plaintiff had the right to sue the defendants under the contract for the time he actually served them as clerk, at the price stipulated to be paid for each month, for wages due him up to the time of his discharge, and also for the wages due him from the time of his discharge to the end of the year, at the rate per month as stipulated in the contract. In other words, the plaintiff had the right to apportion the contract, under the provisions of the Code before cited, and sue for the same as he has done. With which firm the contract was made, was a question of fact for the jury, under the evidence. There was no error in overruling the motion for a new trial on the statement of facts disclosed by the record.

Let the judgment of the court below be affirmed.

BRINKLEY CHANCY, plaintiff in error, vs. WILLIAM F. CARRIGAN, defendant in error.

(TRIPPE, Judge, was providentially prevented from presiding in this case.)

1. It is not competent for the defendant in an execution, by affidavit of illegality, to set up that the debt on which the judgment is founded was illegal, or that the plaintiff was an illegal holder of it. All such questions are settled conclusively by the judgment.
2. On the trial of an issue formed on "illegality," to-wit: payment of an execution, if the plaintiff in execution be dead, the defendant is not a competent witness.
3. The granting or refusal of a continuance is in the discretion of the court, and will not be interfered with by this court, except when there is abuse of that discretion, and when a party seeks to continue the cause, during its progress, on the ground that since the commencement

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of the trial, it has "occurred to him that he could prove a certain fact by A B, who lives in the county," it was no abuse of the discretion of the court to refuse to continue.

Illegality. Continuance. Witness. Before Judge KIDDOO. Early Superior Court. October Term, 1873.

Carrigan brought complaint against Chancy on a note dated January 20th, 1862, due one day after date, payable to J. M. & R. W. Wade, or bearer, for \$189 72, with a credit thereon of \$115 00, of date January 1st, 1863. At the October term, 1866, judgment was confessed by the defendant for \$106 80, principal, with interest and costs of suit. On September 2d, 1873, the execution based on this judgment was levied upon lot of land two hundred and seventy-six, in the twenty-eighth district of Early county, as the property of the defendant. On the same day an affidavit of illegality was filed to the effect that said execution had been paid off. At the October term, 1873, the defendant moved to add another ground of illegality, setting up that J. M. & R. W. Wade were the rightful owners of said note, the title having never passed out of them, as the transfer to the plaintiff "was made for the purpose of encouraging the late rebellion between the states." In support of this motion was attached the affidavit of the defendant that the facts set forth in said additional ground had come to his knowledge since the original illegality was filed. The motion was overruled and defendant excepted.

The defendant proposed to prove by his own oath that he had paid the amount due on said execution to S. S. Stafford, the attorney for the plaintiff. The defendant was held by the court to be an incompetent witness, it being conceded that both Carrigan and Stafford were dead. To this ruling exception was taken.

The defendant moved for a continuance, because "since the commencement of this trial, it had occurred to him that he could prove by William Porter, residing in the county, that he paid S. S. Stafford, the plaintiff's attorney of record, the full amount of the execution."

Chancey vs. Carrigan.

The motion was overruled, and the defendant excepted.

The jury found for the plaintiff. A motion was made for a new trial upon each of the aforesaid grounds of exception. The motion was overruled and defendant excepted, and assigns error on said rulings.

Neither the bill of exceptions nor the record discloses who was the legal representative of Carrigan; the case therefore stands in his name.

I. A. BUSH; J. C. RUTHERFORD; E. C. BOWER; G. B. SWANN, for plaintiff in error.

R. H. POWELL, by brief, for defendant.

McCAY, Judge.

1. The amendment to the affidavit takes a ground which goes behind the judgment. This is directly in the teeth of the section of the Code providing for illegalities: Section 3671. The judgment is conclusive that the ground taken is untrue, as the defendant in *fi. fa.* has had his day in court. Nor are we prepared to say it would have been good as a plea to the original suit. The man who let the plaintiff have the note for an illegal consideration does not complain, and if he is satisfied, it is no business of the maker of the note to complain.

2. The issue on trial was the payment or non-payment of the execution to the plaintiff in execution or his agent. The plaintiff and the agent are both dead. This is within the very words of the exception to the evidence act.

3. It was in the discretion of the court to refuse the continuance, and the showing was very defective. It did not state that it first occurred to the party during the trial. The statement made is perfectly consistent with the idea that he had known it before, and that he had failed to subpoena the witness from neglect. We do not know what the truth of the matter was, nor did the court below. Such statements must be construed most strongly against the party making them.

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Daniel vs. Jackson *et al.*

If he had forgotten the fact, and he had just then remembered it, he could easily have said so.

Judgment affirmed.

BAKER DANIEL, plaintiff in error, *vs.* ALONZO C. JACKSON
et al., administrators, defendants in error.

1. That part of the act of 1831 which authorizes a resale at the risk of a purchaser who fails to comply with his bid, made at an executor's, administrator's or guardian's sale, though not embraced in the Code, is still of force in this state.
2. Where the advertised terms of an administrator's sale are varied by an announcement made on the day of the sale, and the purchaser fails to comply with his bid, in order to hold him liable for the difference on a resale, it is incumbent on the plaintiff to show by clear and convincing evidence that such purchaser had actual knowledge of the altered terms before he bid off the property.

Administrators and executors. Guardian and ward. Sales. Before Judge BARTLETT. Greene Superior Court. March Term, 1874.

For the facts of this case, see the decision.

E. C. KINNEBREW; JOHN C. REED, for plaintiff in error.

J. A. BILLUPS; M. W. LEWIS & SON; J. A. LEWIS, for defendants.

WARNER, Chief Justice.

This was an action brought by the plaintiffs against the defendant, to recover the difference between the price at which the defendant bid off a tract of land at an administrator's sale, and the price for which the land sold at a subsequent sale, the plaintiffs alleging that the defendant refused, after the sale, to pay them for said land. On the trial of the case the jury, under the charge of the court, returned a verdict in favor of the plaintiffs for the sum of \$1,250 00, with interest. The defendant

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made a motion for a new trial on the several grounds set forth therein, and also made a motion in arrest of judgment, both of which motions were overruled, and the defendant excepted. It appears from the evidence in the record that the land was sold by the plaintiffs, as administrators, under an order of the court of ordinary in pursuance of the following advertisement:

"ADMINISTRATOR'S SALE.

"Will be sold before the court-house door in the city of Greensboro, Georgia, on the first Tuesday in November next, within the legal hours of sale, two hundred and twenty acres of land, belonging to the estate of Stephen Jackson, deceased. This tract of land is very valuable, consisting of first-class branch bottom land, well timbered and fresh upland, and containing two settlements. Terms, one-third payable January 1st, 1873, the other two-thirds one and two years, respectively, thereafter. A note with approved security will be required for the first payment.

A. C. JACKSON,

"M. F. JACKSON.

"Administrators."

The land was sold on the first Tuesday in November, 1872, under the aforesaid advertisement, except that some of the witnesses testified that proclamation was made on the day of sale that ten per cent. interest would be required on the last two payments. The defendant was examined as a witness, and stated that he did not hear the proclamation at the sale that ten per cent. interest would be required on the last two payments; he came to the sale to purchase the land under the advertisement, and bid for it under the advertised terms, and thought he was buying the land under such terms; heard nothing to the contrary until told so by one of the plaintiffs, after the sale, when the ten per cent. interest on the notes was demanded. Carlton, a witness sworn for the defendant, stated that he was at the sale, and was standing by defendant talking to him at the time the land was put up for sale, and did not hear any proclamation that ten per cent. interest would be required on the payments. When the parties met to execute the papers, after the sale of

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the land, they disagreed as to the terms of it, and the defendant refused to comply, and the plaintiffs resold the land for \$1,250 00 less than defendant bid for it at the November sale. The court charged the jury that the 2568th section of the Code, requiring advertisement of the terms of sale, was for the benefit of the beneficiaries of the intestate's estate, and that the administrators could add to or vary the advertised terms by proclamation made at the sale, if they believed it was to the interest of the estate to do so, and that all persons attending were bound to take notice of such proclamation, if within hearing distance. The court also charged the jury that if the defendant came to the sale, and conceived that he was bidding on the advertised terms, and did not hear any alteration of such terms proclaimed, then the defendant had the right, by his bid, to hold the administrators to the advertised terms.

1. The first question that we shall consider and determine is the motion made in arrest of judgment. That motion was based on the ground, that, inasmuch as executors, administrators and guardians, are not named in the 3655th section of the Code, authorizing the present action to be brought against the purchaser of property at public outcry, or by any other section thereof, there is no law of force in this state which authorized the plaintiffs to maintain their present action. It is true the codifiers of the laws of force in this state have failed by mistake, or omission, to embrace that part of the act of 1831 in the Code which relates to sales made by executors, administrators and guardians; but that act, as we find it in Cobb's Digest, 515, is of force, in our judgment, as a law of this state, so far as it is applicable to executors', administrators' and guardians' sales, though they are not named in the Code as being entitled to bring suit as specified in that act. There is nothing in the act of 1831 relating to sales made by executors, administrators and guardians, *inconsistent* with any provision of the Code that we are now aware of. The motion in arrest of judgment was, therefore, properly overruled.

2. By the 2568th section of the Code, executors and administrators are required to state in all advertisements of

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sales by them, the terms of sales. By the common law rule, printed or written particulars and conditions of sale cannot be contradicted, added to, or altered, by verbal declarations made by the auctioneer at the time of the sale: Addison on Contracts, 156. In *Jones vs. Edney*, (3d Campbell's Reports, 287,) Lord ELLENBOROUGH said: "Men cannot tell what contracts they enter into if the written conditions of sale are to be controlled by the babble of the auction room." We are not disposed to apply this common law rule so strictly as to exclude all parol declarations as to the altered terms of sale from the printed or written advertisements made by executors and administrators at their public sales, under the laws of this state, when the bidder or purchaser has full knowledge of such altered terms of sale, and *acts* upon them. But we do hold, that in all cases like the one now before us, it is incumbent on the plaintiff to show, by clear and convincing evidence, that the purchaser at the sale had *actual* knowledge of the altered terms of the sale before he bid off the property, in order to make him liable for refusing to comply with the altered terms of the sale from that contained in the advertisement. The two charges of the court to the jury in this case are wholly irreconcilable, and were calculated, and most probably did, mislead the jury in making up their verdict. In the first charge, the court instructed them that all persons attending the sale were bound to take notice of the proclamation made as to the altered terms of the sale, if *within hearing distance*. In the second charge, the court instructed them that if the defendant did not hear any alteration of the terms of sale proclaimed, then the defendant had the right by his bid to hold the administrators to the advertised terms of the sale. Did the jury find their verdict for the plaintiffs on the ground that the defendant was within hearing distance at the time the proclamation of the alteration of the terms of sale was made, or did they find their verdict on the ground that the defendant had actual notice of the alteration of the terms of sale? Who can tell on what ground they found their verdict under the charge of the court? Although the jury

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D. H. BURTS; PEABODY & BRANNON, for plaintiff in error.

C. J. THORNTON, by R. H. CLARK, for defendant.

McCAY, Judge.

The judgment in this case was not based on the verdict of a jury, but was the act of the judge, and in such cases, according to the settled maxims of the common law, the judgment is, during the term, in the breast of the judge. In *Kerr's Action at Law*, page 29, Law Library, 81, this practice is distinctly laid down, and it is referred to the equitable jurisdiction of the court, to-wit: to that supervision of its own proceedings which exists in every court, so to control its action as that its rules and practice shall not be the means of hardship or injustice. Necessary rules of order require that this jurisdiction shall be exercised only at the discretion of the judge. It is not a matter of right in the party asking its exercise; but, like the appeal to a chancellor for his interference, it must be sought for by an appeal to the sense of justice and propriety of the court. Ordinarily, the exercise of this discretion is not matter of appeal. It turns on the special facts of each case, on the conduct of the parties, on the press of business before the court, etc.

In the case before us, we think there was no error. If the judge was satisfied that the movant acted in good faith, and that he was not needlessly troubling the court in asking it to undo what it had done, there was no error. This court will be very slow to interfere in such cases, where no injustice has been done—where only a technical advantage of the other party is disturbed. Whether the effect be, in this case, to cause delay, we do not know. That was doubtless considered by the court. It does not appear that the case was not heard, or that it could not have been heard, at the term.

Judgment affirmed.

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might have believed from the evidence before them that the defendant did not have actual notice of the alteration of the terms of sale, still, if they believed from the evidence that defendant was within hearing distance when the proclamation was made, they would have been bound to have found a verdict for the plaintiffs under the charge of the court. If the latter part of the charge was right, then the first part thereof as to the defendant being within hearing distance at the time of the proclamation, was clearly error.

Let the judgment of the court below be reversed.

O. B. WALTON, plaintiff in error, *vs.* CHARLES B. JONES, administrator, defendant in error.

When, in a suit against an administrator on a debt of his intestate, he had failed to file any issuable plea under oath, and the court gave a judgment for the plaintiff's demand, and *during the term* the defendant moved to open the judgment, with leave to plead *plene administravit*, alleging, under oath, that he had in fact fully administered the estate, and paid all the assets out to debts of higher dignity than the plaintiff's debt; that he was led to think, from the statement of the ordinary to him to that effect, that it was unnecessary for him to plead, as a judgment against him would, in such a case, only bind the assets that might afterwards come into his hands, and that for this reason he had failed to plead *plene administravit*. To this was added an affidavit of the ordinary, who was also a lawyer, that he had been consulted by the defendant as to whether it was necessary for him to plead, and that he, knowing that all the assets had been paid out to debts of higher dignity, told him it was not necessary, as a judgment in such a case would only bind future assets, and that he so thought at the time: *Held*, that it was not error in the judge to grant the motion. During the term it is in the *discretion of the court* to review any judgment it may have made.

Practice in the Superior Court. Judgments. Before Judge JAMES JOHNSON. Chattahoochee Superior Court. March Term, 1874.

This case is sufficiently reported in the above head-note.

The Mayor, etc., of Savannah *et al. vs.* Solomon's Lodge, etc.

THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH
et al., plaintiffs in error, *vs.* SOLOMON'S LODGE, No. 1, F.
AND A. M., defendant in error.

A masonic lodge being a charitable institution, is exempt from taxation.
This exemption extends to any house belonging to it.

Injunction. Taxes. Before Judge SCHLEY. Chatham
county. At Chambers. November 26th, 1874.

For the facts of this case, see the decision.

W.S. BASINGER, for plaintiffs in error.

RUFUS E. LESTER, for defendant.

WARNER, Chief Justice.

This was a bill filed by the complainant against the defendants, praying for an injunction to restrain the collection of a city tax on the property of complainant as set forth in its bill, on the ground that said property is not subject to taxation under the laws of this state. The presiding judge granted the injunction prayed for, and the defendants excepted. The complainant alleges in its bill that it is a body corporate under the laws of this state, by the name of "Solomon's Lodge, Number one, Free and Accepted Masons;" that it is a charitable institution, and that the city property taxed, is held and used by it for charitable purposes. By the 798th section of the Code "all poor houses, alms houses, houses of industry, and *any house belonging to any charitable institution,*" are declared to be exempt from taxation. Is a masonic lodge a charitable institution? It was so recognized and styled by the general assembly of this state as far back as 1796: See Marbury & Crawford's Digest, 147. Assuming, as we are authorized to do, that a masonic lodge is a charitable institution, it necessarily follows from the express words of the statute, that *any house* belonging to it, is exempt from taxation. The 11th paragraph of the 798th section of the Code, declares that all

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stocks owned by the state, or by literary or charitable institutions, for the *legitimate purposes of such*, shall be exempt from taxation. It is insisted by the plaintiffs in error, that the words "any house belonging to any charitable institution," should not be construed so as to mean *every* house belonging to *every* charitable institution. The reply is, that the words "any house belonging to any charitable institution," are broad enough to include the house belonging to the complainant, as set forth in its bill. It is competent for the general assembly to pass an act restricting the meaning of the words contained in the Code, but until it shall do so, it is the duty of the courts to construe them in accordance with the plain and unambiguous terms thereof.

Let the judgment of the court below be affirmed.

DAVID G. RODGERS, plaintiff in error, vs. SAMSON BELL
et al., defendants in error.

[TRIPPE, Judge, was providentially prevented from presiding in this case.]

1. When an action of ejectment is brought against one in possession of land, who is in fact a tenant of a third person, and it appears that the landlord knows of the suit, though he is not made a formal party, and the plaintiff recovers the land, he may, under a writ of possession, turn out, not only the tenant, but the landlord who has resumed the possession.
2. Under the decision of this court in *Akin vs. Freeman*, the dormant judgment act was suspended under the acts passed in 1860, and during the war, and in 1865 and 1866, suspending the statutes of limitation.
3. When an action of ejectment was pending against one in possession of land, and there was a verdict for the plaintiff, and the defendant appealed, and on the appeal, he, with the plaintiff's consent, withdrew the same, and a writ of possession issued, and was executed by turning out of possession a third person, who claimed that the defendant in the suit was his tenant, and that the appeal was withdrawn in fraud of his rights and by collusion:

Held, that to establish such fraud, it is not sufficient to prove the fact of the tenancy, and that the landlord did not know of the withdrawal of

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the appeal; it must further appear that the plaintiff knew the defendant was only a tenant, and that the landlord was defending the suit in the tenant's name.

Ejectment. Landlord and tenant. Judgment. Statutes of limitation. Fraud. Evidence. Before Judge CLARK. Sumter Superior Court. April Term, 1873.

David G. Rodgers brought trespass *vi et armis* against Samson Bell and Alexander W. Wheeler for \$1,000 00 damages, for ejecting him from a certain lot of land in the county of Sumter. The record fails to disclose any plea.

Francis W. Davis, Pleasant J. Allen and Steve V. Allen testified substantially as follows: Plaintiff was in the peaceable possession of the land described in the declaration, from January, 1860, to January 1st, 1872, claiming it as his own. On the day last aforesaid he was dispossessed by the defendants. Wheeler stated that he was acting under the authority of a writ of possession in favor of Bell against one Henry Wimberly. Plaintiff asked for time to make an affidavit that he did not hold under Wimberly. This was refused him. Estimated his damages at \$1,000 00.

John R. Worrill testified substantially as follows: In 1859 an action of ejectment was brought by the defendant Bell against Wimberly for the land. The latter was then in possession as the tenant of the plaintiff, Rodgers. Rodgers employed witness and S. H. Hawkins to defend the action. On the first trial, it was thought advisable to confess judgment and to enter an appeal. Afterwards, in January, 1860, Bell procured Wimberly, in fraud of Rodgers' rights, to withdraw said appeal, and to attorn to him. Wimberly was only a nominal party. The withdrawal of the appeal was without the knowledge or consent of Rodgers. When witness and Hawkins were employed to defend said action of ejectment, Wimberly and Rodgers came to them together. The appeal was withdrawn by a fraudulent combination between Bell and Wimberly. The latter died some time before the year 1871.

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S. H. Hawkins testified substantially as did the preceding witness.

The record of the action for the land by Bell against Wimberly was introduced. It showed a confession of judgment, reserving the right of appeal, and judgment at October term, 1859; also, a withdrawal of the appeal by the consent of the plaintiff, on January, 11th, 1860; also, a writ of possession against Wimberly, of date December 14th, 1871, with a return by A. W. Wheeler, deputy sheriff, dated January 2d, 1872, showing its execution. The record fails to disclose that Rodgers ever was made a formal party defendant.

The jury found for the defendants. The plaintiffs moved for a new trial, upon the following grounds, to-wit:

1st. Because the verdict was contrary to the charge of the court, to the effect that if more than seven years had expired before there was any attempt made to enforce the judgment against Wimberly after January, 1860, by writ of possession, for the premises in dispute, and no entry made, that the judgment was dormant, and the defendants were trespassers.

2d. Because Wimberly was dead at the time the writ of possession issued.

3d. Because the verdict was contrary to the law and the evidence.

The motion was overruled, and the plaintiff excepted.

JOHN R. WORRILL, for plaintiff in error.

No appearance for defendants.

MCCAY, Judge.

1. The tenant—the actual tenant—in possession, is the proper defendant in an action of ejectment. He is the adverse holder to the plaintiff, and he has a full right to treat him as the person keeping him out of his land. And our statute authorizes the writ of possession to issue, and to oust not only the defendant, but all persons put in *possession* by or claiming under, or by virtue of any conveyance from, him. In this

case, the defendant in ejectment was the tenant of the present plaintiff, and like a good tenant, and as was his duty, he informed his landlord of the suit, and the landlord took steps to defend in his tenant's name. He employed counsel, who pleaded, and confessed judgment and then appealed. By not making himself a party he authorized the plaintiff to treat the tenant as the true owner or claimant, and by the authorities he made himself liable at common law for costs. The action of ejectment would be perfectly worthless if the landlord might, after judgment against the tenant, and before writ issues, resume his possession, and thus defeat the judgment. By a little management, the plaintiff could thus always be defeated. But the law is well settled otherwise.

2. In *Akin vs. Freeman*, this court, a majority, held that the dormant judgment act was suspended from 1861 to 1868, and so long as the court is constituted as it now is this is no longer an open question: See *Akin vs. Freeman*, 49 *Georgia*, 51.

3. As a matter of course, if the plaintiff in the ejectment suit colluded with the tenant, and got him to withdraw the appeal with intent to defraud the present plaintiff, the judgment would be void, and be no protection to Bell against the present suit. The plaintiff's witnesses very positively say there was this fraud and collusion, and we are free to say we have never seen such testimony as this before in a brief of testimony. The witnesses state in broad terms that Bell colluded with Wimberly, and that the appeal was withdrawn in fraud of Rodgers' rights. The brief further says that two other witnesses testified "substantially to the same things." How such evidence was allowed to go to the jury we are unable to comprehend. It is all the conclusions of the witnesses. Bell colluded with Wimberly. How Bell acted in fraud of Rodgers' right? How, it is not said, and it does not appear. So far as does appear, there was no *evidence* that Bell knew anything of Rodgers in the matter. He may have done so, and perhaps he did. But none of the witnesses say so. Fraud cannot be proven in this way. A witness must say more than

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that there was fraud. That is a conclusion of law from facts, and the facts must be stated. The jury do not seem to have been willing to take the conclusions of the witnesses for facts, and found there was no proof of fraud, and we cannot say they did wrong.

Judgment affirmed.

THE BARNETT LINE OF STEAMERS, plaintiff in error, vs.
BLACKMAR & CHANDLER, defendants in error.

1. When parties hold themselves out to the public as doing a particular business in a firm name, the law will imply a partnership agreement as to third persons who contract with them in that firm name, whatever may be the real nature of their connection as between themselves.
2. Where a parol contract was made between the plaintiffs and the defendant in August, 1867, by which the former were employed as the agents of the latter for the period of one year from the 1st of the ensuing October, and the salary agreed upon with the view of the necessity imposed upon the plaintiffs by the duties of such agency of employing a clerk, and a clerk was employed and paid by them, such action amounted to a part performance, which would prevent the defendant, on refusing to comply, from setting up the statute of frauds.

Partnership. Statute of frauds. Before Judge JAMES JOHNSON: Muscogee Superior Court. October Term, 1873.

For the facts of this case, see the decision.

PEABODY & BRANNON, for plaintiffs in error.

H. L. BENNING; BLANDFORD & GARRARD, for defendants.

WARNER, Chief Justice.

This was an action brought by the plaintiffs against the defendants as partners using the firm name of "Barnett Line of Steamers," to recover the sum of \$1,500 00, which the plaintiffs allege the defendants were indebted to them for services

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rendered as their agents. The defendants filed their plea of the general issue, and also a plea denying the partnership as alleged in plaintiffs' declaration. On the trial of the case, the jury, under the charge of the court, found a verdict for the plaintiffs. The defendants made a motion for a new trial, on the several grounds stated therein, which was overruled by the court, and the defendants excepted. On the trial, both the plaintiffs were examined in their own behalf. The substance of their testimony was, that in August, 1867, A. Barnett and D. Fry desired to employ plaintiffs as agents of the Barnett Line of Steamers. Plaintiffs told them they would have to hire a clerk to assist them, if they acted as agents, and it would cost \$2,000 00. Barnett thought they could get a clerk for \$1,500 00, and thinking they could, plaintiffs agreed to take \$1,500 00; this was to cover the expense of the clerk, the plaintiffs expecting their profit from the custom of the boats, and the business growing out of the agency. Plaintiffs agreed to hire Mr. Dixon as a clerk, based on this contract, for twelve months, commencing October 1, 1867, and agreed to pay him \$1,200 00, and sell him his provisions at cost, which was equal to about \$300 00. Mr. Dixon understood that he was employed to assist plaintiffs, in case they received the agency. Blackmar went to New York after making the contract with Barnett, and saw Barnett there; he gave witness (Blackmar) some cards to distribute, among which was one shown and read to the jury, of which the following is, in substance, a copy:

"Barnett through line for New York, on the Apalachicola, Chattahoochee and Flint rivers, in connection with Benner, Brown & Pinkney's Florida line, by steam and sail.

"Through bills of lading given for cotton and goods. See rates on back of card. Agents: Benner, Brown & Pinckney, 9 South William street, New York; H. C. Hart, Eufaula, Alabama; Blackmar & Chandler, Columbus, Georgia; B. F. Bruton, Bainbridge, Georgia; Barnett & Company, general agents, Apalachicola, Florida."



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On the reverse side was a list of through freight rates. Blackmar did not return to Columbus until the 3d or 4th of October; was in Savannah on the 2d October. Both Blackmar and Chandler testified they had no notice that the agency was discontinued until the publication of the following notice in the Columbus Sun :

“The Barnett Through Line has no agency at this place.

“BARNETT & COMPANY,

“General agents, Apalachicola.

“Columbus, November 2d, 1867.”

Plaintiffs at once, upon making the contract, began to distribute cards and circulars for the Barnett Line, and to answer questions, solicit freight, and collect bills for the Barnett Line, and continued to do so until the publication of the notice in the Sun; cannot specify any particular bills collected, nor remember whether any of the boats of the Barnett Line arrived or departed from Columbus, after the 1st of October, until and before the publication of the notice. Blackmar testified that Captain Dan. Fry did not show him any letter from Barnett notifying plaintiffs that their services as agents would not be wanted. Fry did mention to Blackmar that he had a letter from Barnett, and put his hand in his pocket as though to take it out, but said he would wait until Barnett arrived; that he would be ashamed to read it to him. Barnett was not in Columbus at the time; thinks the boats were owned by Barnett, Fry, Markham, Stapler, Bowers, and perhaps others.

Blackmar & Chandler did not discharge Dixon; kept him twelve months, and paid him \$1,200 00, and sold him his groceries at costs; did not discharge him because he had been hired for a year. Blackmar & Chandler had been agents for the Barnett Line before the contract, and served without other compensation than the trade of the boats. The cards published in the Sun, in August and October, 1867, referred to such agency before the contract. Dixon was of some value to plaintiffs; can't say how much; his services were not needed, and plaintiffs' business could have been well conducted with-

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out him; he was only engaged to do the extra work expected to grow out of the contract. Plaintiffs introduced a card from the Daily Sun, of September 21st, 1867, as follows:

"Barnett's Steam and Sail Dispatch Through Line. Cheapest and best route of shipping from New York, New Orleans, St. Louis, Cincinnati, and western rivers, to Bainbridge, Georgia, (Flint river,) and Columbus, Georgia, (Chattahoochee river.) All freight from western markets should be consigned to agents at New Orleans, who will forward them, free of commission for forwarding. Owing to the fluctuations of freights on the Ohio and Mississippi rivers, shippers will find it to their advantage to consign as above instead of getting specific rates. No charges for receiving or forwarding on goods or cotton consigned to Barnett & Company, at Apalachicola, Florida. Through bills of lading for cotton or merchandize to be shipped to New York or New Orleans, given by the agents at this point, etc. Agents—

BLACKMAR & CHANDLER,

"Columbus, Georgia.

"BARNETT & COMPANY, General Agents."

Chandler testified, also, as follows: On the day of the appearance in the papers of the notice of discontinuance, plaintiffs addressed a letter in regard to the matter to Messrs. Barnett & Company, agents, and D. Fry, which letter was introduced. In reply to this, Barnett and Abram Fry called on plaintiffs at their office or place of business for the purpose of compromising and to make a new contract, Mr. Barnett giving as a reason for the discontinuance of the agency that two boats belonging to the line were going to be sent to Texas, and that only two would remain, and that the item of \$1,500 00 would appear too large on the balance-sheet for plaintiffs' services as agents for the remaining boats, but was willing to make a new contract, and pay plaintiffs \$750 00, and continue the agency. As they could perform the duties connected with two boats without assistance, and thinking they could compromise with Mr. Dixon, and preferring making a concession to having litigation, plaintiffs agreed to accept their proposition, provided security was

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given for the payment of the \$750 00, and the fulfillment of the new contract, and so notified Messrs. Barnett & Company and Fry. Copy of letter attached. They declined giving security, and all connection between them closed. Plaintiffs did everything required of them by the contract, and the violation was not induced by any action of plaintiffs', but by the prospective removal of the two boats to Texas, which was not contemplated until the contract had been in force some weeks. Captain Stapler, one of the owners, prevented the removal of the boats.

The following is a copy of the letter :

"COLUMBUS, November 2d, 1867.

"MESSRS. BARNETT & COMPANY and D. FRY,

"Agents Barnett Line of Steamers.

"SIRS:—In reply to our written communication this morning, you verbally propose to do what is right, and pay us for our services, or compromise our demands. In a spirit of concession, and with a desire to settle without litigation, we propose that you pay us \$750 00 cash, and end our agency. This offer shall in no way militate against our original claim, and your refusal or acceptance of it is asked this day.

"Respectfully,

"BLACKMAR & CHANDLER."

Both witnesses testified that the contract was verbal.

On the part of the defendants, A. Barnett testified : Plaintiffs first acted as agents of the Barnett Line in 1866 or 1867; they were grocery merchants; as such agents, they posted the departure of the boats, answered inquiries and collected bills, and anything else necessary to the interest of the line. This was with no compensation, except from an increase of their business from persons having dealings with the boats. About May or June, 1867, he was in Columbus, and, in company with D. Fry, called on plaintiffs, who were then acting as agents, and during a conversation the question of an agency with a salary was discussed. Plaintiffs asked the appointment in case any such agency was established, to com-

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mence October 1, 1867, and end October 1, 1868; the agent's duty was to do as much as plaintiffs had done, and as much more as they could. After this conversation, witness went to New York, and returned about October 1, 1867; had no other conversation with plaintiffs before October 1, 1867. Wrote a letter from New York to D. Fry, in September, 1867, and sent it by mail; kept no copy; has not original; the substance was to the effect, that owing to uncertainty in anticipated business for the Barnett Line, it would not authorize the establishing of a salaried agency at Columbus, and this notice was to be given to plaintiffs at once. In October, 1867, when he came to Columbus, had a conversation with plaintiffs, in which they proposed a compromise, which was refused. After the 1st of October, plaintiffs continued to post boats voluntarily, as they had been doing. Before October 1st, the officers of the boats were instructed to withdraw all accounts left in the hands of plaintiffs for collection, and not to transact any business through them. Witness subsequently caused a notice to be published in the *Sun* and *Times* "that the Barnett Line had no agency in Columbus," because said Blackmar & Chandler continued to post boats voluntarily, after being requested to discontinue; and after witness refused to accept the compromise, he learned also that plaintiffs had acted unfriendly to the line, hence his desire that the public should be aware of the fact that there was no agent at Columbus. The cards referred to were published long before October, 1867, and whilst plaintiffs were acting as voluntary agents. None were published after October 1st, 1867.

Daniel Fry testified as follows: The "Barnett, Fry, and Jackson" composed the Barnett Line. In the summer of 1867, Barnett made an arrangement with plaintiffs to act as agents for the Barnett Line in Columbus; the service was to begin October 1st of that year, and last one year. Barnett went to New York after making this arrangement, and wrote witness during the latter part of September in reference to the contract. That letter is lost; received the letter the latter part of September, 1867, and was in Columbus at the time; showed it

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to Captain Klink, and as soon as he had read it, took it immediately to plaintiffs' store, and handed it to Mr. Blackmar at his desk, and he read it in witness' presence. This was a week or more before October 1st, 1867. The contents of the letter were, in substance, to notify plaintiffs that in consequence of disappointment in his expectations, and the probability that the boats would not pay, the Barnett Line would not need the services of an agent in Columbus, Georgia, as he expected, and the line would not need the services of plaintiffs, and they might consider the arrangement with them at an end. Plaintiffs rendered no service that witness knows of under the contract. Plaintiffs expressed regret that the contract had not been consummated, so they might go on under the same. Had several general conversations with plaintiffs in which they spoke of their disappointment in not getting the contract; does not remember any particular remark made by them.

W. L. Stapler testified as follows: He never was a partner with A. Barnett; he only owned an interest in two boats, to-wit: the *Barnett* and *Fry*; had nothing to do with the other two boats. Each boat ran on its own account, kept separate books and accounts, paid its own bills and was under the control and management of its own officers. Barnett acted as agent for all the boats, because of his controlling interest, and against witness' consent. Barnett owned the *Huntsman*, and much the largest interest in the other three boats. Knew nothing of the contract with plaintiffs until he saw their notice in the paper announcing their agency for the Barnett Line. The first card he saw had only three boats: the *Fry*, *Barnett* and *Jackson*, and after Barnett bought the *Huntsman*, which was in July or August, 1867, it was added to the card and a new card issued. No boat left Columbus during the month of October, 1867, and but one arrived, to-wit: the *Fry*; the river was too low for any boat to run that month, and in the early part of November. The line was composed of these four boats; they ran in connection with steamers and sail vessels from New York and New Orleans to Apalachicola, and

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had an established rate of through freights, and under this each boat collected its own freight; the owners of the four boats ran them together under the name of the Barnett Line of Steamers, charging the same rates of freight. After the contract was made with plaintiffs, Barnett determined to send two of the boats to Texas, and the price of \$1,500 00 for the agents was regarded by him as too high for agents for two boats.

Charles A. Klink testified as follows: He was captain of the *Jackson*; she was left near Fort Gaines, and witness came up to Columbus in the latter part of September, 1867; the day he arrived in Columbus he met D. Fry at the corner of Rosette & Lawhon, on Broad street; Fry remarked that he had just received a letter from Barnett, and asked witness to read it, which he did; the letter instructed Fry to notify plaintiffs that their services would not be wanted as agents for the Barnett Line; Fry started across the street with the letter in his hand, and went into the store with the letter in his hand open; this was in September, and before the 1st of October, 1867. Plaintiffs did no service for the Barnett Line of Boats after the 1st of October, nor during said month; no boat left the wharf, or arrived at it, during the month of October, 1867; in fact, none until some time in November; the river was too low for any boat to run. Barnett owned stock in all the boats; Fry owned stock in the *Jackson*, *Barnett* and *Fry*; Bowers in the *Barnett* and *Fry*. He remained at Columbus some time, superintending the preparation of the *Barnett* and *Fry* for their departure for Texas; some of the owners objected, and took legal steps to prevent it; the boats did not go. Witness' recollection was that Blackmar was in Columbus when Fry went over to show the letter, but after hearing the testimony of Blackmar, his recollection was somewhat shaken. Barnett was agent for the line.

L. E. O'Keefe testified as follows: He was a clerk on the steamer *Barnett* in 1867. Does not remember whether the boat arrived or departed from Columbus from October 1, 1867, to November 3, 1867. Went into the store of plaintiffs, and

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after paying them a bill for stores bought for the boat, Mr. Chandler offered to collect the freight bills due the boat; witness said to him, "You know I am instructed not to recognize you as agent, and I do not want to leave the bills with you, as agent, to collect;" Chandler replied that it would make no difference; that he would collect the bills; witness then said, "Very well; I will leave them with you on that understanding." The *Barnett* was owned principally by Barnett, Stapler and D. Fry; the *Huntsman* entirely by Barnett; the *Fry* owned by the same parties as the *Barnett*, and the *Jackson* owned by Barnett and Fry alone. The boats were run as a line, but the account of each boat was kept separate, and the owners of one boat were not at all interested in the profits or losses of the others; the profits and losses of each boat were shared by its owners. The boats did all take freights at the same rates, and formed a through line with lines of railroads and steamships. The clerk of each boat could give a through bill of lading to New York or New Orleans by the boat of which he was clerk, but the clerk of one boat could sign no bill of lading for another; there was no partnership between these boats, and there was nothing in which these boats had a common interest in the profits or losses.

The court, amongst other things, charged the jury: "If plaintiffs entered upon the performance of said contract, and continued to work under said contract until the 2d of November, 1867, and were then discharged by the defendants without just cause, or prevented by them from performing the contract, the law considers this as tantamount to performance, and plaintiffs are entitled to recover the full amount stipulated to be paid for the whole year, with interest from the 1st of October, 1868." To which charge defendants excepted.

The court also charged, "that persons who were joint owners of a boat were *quasi* copartners; that if there were three or four boats running the river for freight, and these boats were owned by different persons in different shares, and if some of the owners held shares in each boat, the owners of

each boat were copartners *quo ad hoc*. Further, that if there were four boats, and they were owned by different persons, one or more having a share in each as part owner, and if the owners of these several boats agreed to run them as a line, and that, as a line, each boat should have the right to take freight from a ship at Apalachicola, and to charge therefor and to distribute the freight paid among the owners of the particular boat, then the owners of each and all of said boats became thereby *quasi* copartners." To which charge defendants excepted.

The court also charged: "If the said four boats had a common agent, and if such an agent made the contract alleged and set out, the defendants would be liable for its breach if they were part owners of any of the boats, although no partnership existed between the boats." To which charge defendants excepted.

After the court had charged the jury, and argument had, the jury retired and afterwards came into court and, by their foreman, asked the court whether, in the event the jury found for the plaintiffs, they were bound to find \$1,500 00. The court thereupon charged the jury, "that the supreme court had so decided, and they were bound to find \$1,500 00, if they believed that was the amount agreed to be paid." To which charge defendants excepted.

There were two questions raised on the argument here. First, whether the evidence in the record is sufficient, under the law, to have authorized the charge of the court as to the defendants being partners, the partnership having been denied by them in their plea. Second, the contract being a parol contract, and not to be performed within a year, whether there was sufficient evidence of part performance to take it out of the statute of frauds.

1. The defendants were engaged in running a line of steamboats on the Chattahoochee river, from Columbus to Apalachicola, under the name of the "Barnett Line of Steamers," Barnett acting as the general agent of the parties engaged in that business. The contract was made with the

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plaintiffs by Barnett, as such general agent, in relation to the particular business of running the Barnett Line of Steamers. There can be no doubt, we think, from the evidence in the record, that the defendants had a community of interest in that particular business or adventure, although they may not have had any community of interest in the capital stock employed in it. If the defendants had no community of interest in the boats, but had a community of interest or participation in that particular business or adventure, in which they were engaged, they would be liable as partners to third persons dealing with them in their firm name, in relation to, and on account of, that particular business or adventure. The defendants were engaged in running a line of steamboats on the Chattahoochee river, under the name and style of the "Barnett Line of Steamers," for the purpose of earning and collecting freights for the transportation of goods by that line of steamers, and were entitled to receive the profits of that adventure in which they were engaged.

Whatever may have been the private understanding between the owners of the respective boats composing the Barnett Line of Steamers as between themselves, in relation to the freights carried by the respective boats, could not affect the rights of third persons contracting with them in the name of the firm which was ostensibly running that line of steamers, and receiving freights as the Barnett Line of Steamers. Barnett, as the general agent of the Barnett Line of Steamers, made the contract with the plaintiffs in relation to the particular business in which the defendants were jointly engaged in their firm name, and as to that contract the law will recognize them as partners in that particular business, in relation to which the contract was made, so far as the rights of the plaintiffs are concerned. The law will imply a partnership engagement when parties hold themselves out to the world as doing a particular business in a firm name, as to third persons, who contract with them in that firm name, whatever may be the real nature of their connection as between themselves. Although the charge of the court would have been

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technically more accurate if it had said the defendants were partners in that particular business or adventure in which they were engaged, so far as the plaintiffs were concerned, instead of saying they were mere "*quasi* copartners," still the charge, in view of the facts of the case, was substantially correct, and we find no material error in it which would authorize us to grant a new trial.

2. In relation to the statute of frauds, we are of the opinion that the refusing to perform the contract on the part of the defendants, after the plaintiffs had partly performed their part of it by the employment of Dixon as clerk, would render it such a fraud on the part of the defendants as will take the case out of the provisions of the statute: Code, 1951. After a review of the entire record in this case, we find no error, *technical* or otherwise, which would authorize the granting of a new trial. It is for the interest of the public that there should be an end of litigation, and especially so in this case.

Let the judgment of the court below be affirmed.

BRIDGET A. CROGHAN, trustee, plaintiff in error, *vs.* THE NEW YORK UNDERWRITERS' AGENCY, defendant in error.

(TAIRRE, Judge, was providentially prevented from presiding in this case.)

1. In an action against an insurance company for damages, in that its agent had promised the plaintiff to renew a certain policy on its expiration, is demurable, when it is not alleged that the plaintiff left the premium with the agent, or that, at the expiration of the policy, it was paid or tendered. It is not sufficient to allege that the money to pay the premium was in the hands of *plaintiff's* agent.
2. It is not competent, under section 3480 of the Code, to amend an action for damages by reason of the defendant's fraud or neglect, by adding a count on an express contract, or by altering the original declaration so as to change it into a suit upon an express contract.

Insurance. Amendment. Before Judge CLARK. Sumter Superior Court. April Term, 1874.

Croghan vs. The New York Underwriters' Agency.

Fridget A. Croghan, trustee, brought case against the New York Underwriters' Agency for \$500 00 damages, averring substantially as follows: That said defendant, by its agent, in the city of Americus, on October 13th, 1869, insured certain property of the plaintiff to the amount of \$500 00 for the term of one year; that about two weeks before the expiration of said policy, said defendant, by its agent, promised to renew the same when it should expire; that notwithstanding said promise, and notwithstanding the fact that money sufficient to pay the premium upon such renewal was left in the hands of plaintiff's agent for said purpose, said defendant failed to renew said policy, as it had contracted to do; that plaintiff believed that the defendant had complied with its promise until about December 1st, 1870, when the property insured was totally destroyed by fire, to the damage of plaintiff \$500.

The defendant demurred to the declaration. Pending the argument of this question, plaintiff proposed to amend by adding a count upon an express contract of insurance, charging that the defendant did renew said policy on the 13th of October, 1870, for the period of one year.

This being refused by the court, the plaintiff proposed to amend the original declaration by changing it into a suit upon such express contract. This the court also refused to allow. The demurrer was then sustained, and the plaintiff excepted to each of the rulings aforesaid.

W. A. HAWKINS; J. A. ANSLEY; JACK BROWN; FORT & HOLLIS, for plaintiff in error.

N. A. SMITH; GUERRY & SON, for defendant.

MCCAY, Judge.

1. We are clear that the original declaration in this case failed to state a good cause of action of any kind. It alleges, in substance, that the plaintiff was the holder of a policy issued by the defendant, which was about, in a short time, to expire; that on the 1st of October, 1870, about two weeks before it would expire, the agent of the company promised,

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when it did expire, he would renew it, and that he failed so to do, although the plaintiff had money in the hands of his (*the plaintiff's*) agent to pay the premium; that the plaintiff, supposing the policy to have been renewed, rested content; that the property was soon after destroyed by fire, and that he has thus been damaged by the failure of the defendant's agent to insure, as he had promised him to do. Now, it is not competent for one to employ an insurance agent to effect an insurance or renewal in the agent's own company. He cannot take the agency of one wishing to insure, without the consent of his principal. To be agent for both parties to a contract is to undertake inconsistent duties, and such a mutual agency requires the consent of both principals to the mutuality of the agency. But there is no allegation that anything was paid for the renewal. The only thing alleged is that the agent promised to renew. It is not charged that he promised to renew without the cash, or that he promised to call on plaintiff's agent for the cash. It does not appear that there was any understanding about this. It simply appears, by the allegations, that plaintiff's agent had the money. It is not even said that the defendant's agent knew that fact, or even knew who plaintiff's agent was, though we do not think, had he known it, that would help the case. If it is meant simply that the defendant's agent promised to renew, then the promise is without consideration. It is a gratuitous undertaking, and is not the basis of an action. Though it is not alleged that this promise was by parol, and the declaration is not demurrable for the want of an allegation that it was in writing, yet the law requires an insurance contract to be in writing, and one must conclude, from all that is said, that there is even this defect in the case. But if nothing passed other than is stated in the declaration, the plaintiff had no right to expect or think there had been a renewal, and if he did so, he is the cause of his own misfortune. All he alleges is, that the defendant's agent promised to renew. Common sense must construe this to mean, he would renew on payment of the premium. He had no right, as agent, to make any other promise. From

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the very nature of his agency, even if he could do that, certainly, when the time came, it would be his duty not to insure if any change had taken place increasing the risk, even if, when the day came, the plaintiff's agent had tendered the money.

2. But the plaintiff proposed to amend by suing on the policy as renewed and setting it forth. Could he do this? The declaration was originally a declaration *ex delicto*. The amendment adds a count *ex contractu*. The first count is for a fraud or for negligence; the second is for breach of a contract. The Code plainly implies that two such causes of action cannot be joined, Code, section 3261, since it provides only for the joinder of all causes of action *ex contractu* with others of like character, and so of actions *ex delicto*. And this is clearly the logic and sense of the matter. The general issue is different, and the whole nature of the thing is different. The decision in which it is intimated that one may be changed to the other was before the Code. It is now provided, section 3480, that no amendment, setting forth a new or different cause of action, can be allowed. It seems absurd to say that an action for deceit can, in any case, be for the same cause of action as an action on a contract. Different elements are necessary to constitute them. One is based on fraud, the other on contract. The first count here is for fraud or negligence for *not contracting*, the second is for breaking the contract. We think the amendments were properly rejected for another reason. The written contract of insurance is set out; by its terms, the renewal is to be entered on it; it does not appear there, and it is not alleged that it is written any place else. A contract of insurance must, by the Code, be in writing. It is very plain that this alleged renewal was not in writing, and if not it is absurd to sue on a contract. If there was no writing, the action on the case for a fraud is all that will lie, and, as we have seen, the count on that idea is fatally defective. We do not decide the other points as they are immaterial.

Judgment affirmed.

Manigault *vs.* The State of Georgia.

THOMAS MANIGAULT, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

Where, upon an indictment for an assault with intent to murder, the defendant was found guilty of whipping his wife, the judgment should be arrested.

Criminal law. Arrest of judgment. Before Judge BARTLETT. Chatham Superior Court. May Term, 1874.

For the facts of this case, see the decision.

R. R. RICHARDS, by A. B. SMITH, for plaintiff in error.

ALBERT R. LAMAR, solicitor general, for the state.

WARNER, Chief Justice.

The defendant was indicted for the offense of "assault with intent to murder," and on the trial therefor the jury returned a verdict in the following words: "We, the jury, find the prisoner guilty of a misdemeanor in whipping his wife." The defendant made a motion, in arrest of judgment, on the ground that the verdict of the jury was for a different offense than that alleged in the indictment, and for a different kind of offense, and because it is nowhere alleged in the indictment that defendant ever assaulted or whipped his wife, or that he ever had a wife. The motion in arrest of judgment was overruled by the court, and the defendant excepted. It appears on the face of the record in this case, that the defendant was charged in the indictment with one offense and found guilty by the jury of another and distinct offense. Whipping a man's wife is made a separate and distinct offense by the Code: See section 4573. The verdict in this case affects the real merits of the offense charged in the indictment by ignoring that charge altogether, and finding the defendant guilty of a distinct offense with which he was not charged in the indictment, and had no notice to defend himself against it. If the defendant should be indicted for whipping his wife, this indictment

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would be no bar to that, and therefore the judgment should have been arrested for the errors and defects apparent on the face of the record, upon which no legal judgment could have been rendered.

Let the judgment of the court below be reversed.

JOHN T. OZMORE, plaintiff in error, vs. HOOD & KIDDOO,
defendants in error.

[TRIIPPE, Judge, was providentially prevented from presiding in this case.]

1. The sayings of a person in possession of land are evidence in his favor to show an adverse holding; and in a claim case, the sayings of the defendant in execution while in possession, or of any other person in possession of the land, are evidence for the plaintiff in execution to show that the defendant, or such third person, was not the tenant of the claimant.
2. After the levy of an attachment upon land, it is not competent for the defendant to sell the land even for a valuable consideration, or *bona fide* to pay a debt then due, so as to affect the lien of the attaching creditor.
3. In this case, whilst the charge of the court as to what the jury should find if they believed the land in dispute had been bought with trust funds in the hands of the defendant in execution belonging to the claimant, is objectionable, yet, in view of the whole testimony, the court did not err in refusing to grant a new trial.

Evidence. Possession. Attachment. New trial. Before Judge HANSELL. Randolph Superior Court. November Term, 1873.

On April 1st, 1871, an attachment in favor of Hood & Kiddoo against Thomas Ozmore, for \$408 09, principal debt, besides interest and costs, was levied upon lot of land number one hundred and fifty-two, in the ninth district of Randolph county. Judgment was obtained at the November term, 1871, and execution was issued and levy made. A claim was interposed by John T. Ozmore.

The evidence disclosed, in brief, the following facts: On

September 1st, 1856, Thomas Ozmore was appointed guardian for his children by the ordinary of Randolph county. A considerable sum of money (the evidence fails to disclose the exact amount,) had been previously turned over to him by his father-in-law in trust for his wife and children. His wife died in May, 1856. He married a second time, but a separation ensued, and a libel for divorce was filed. On September 1st, 1871, he executed an instrument in Russell county, Alabama, reciting that in consideration of \$3,325 00, held in trust by him for his children, Martha A. Duke, John T. Ozmore and Richard Ozmore, deceased, under a deed of trust from their grandfather, Nathan F. Shirley, he relinquished to them all his right to the lot in controversy. He further bound himself to give immediate possession to them of the tract of land known as the "Ozmore Home place," it being property purchased with said trust money, and known as lot one hundred and eighty-four, in the ninth district of Randolph county. In consideration of which, said children were to give him a receipt in full of all demands to date, upon his delivering to them his note for \$600 00, it being the balance due.

The claimant testified that the lot in controversy was turned over to him and his sister, Martha A. Duke, in the latter part of the year 1868, by their father, in part of what was due them; that they were the only surviving children.

Martha A. Duke testified that said lot was turned over to claimant at the aforesaid time, in part of what was due him.

The defendant in execution, Thomas Ozmore, testified that he owned said lot until February, 1871, when he thinks he conveyed it to them, but that perhaps the deed was not executed until September, 1871; that he certainly sold it to them in February, 1871.

There was also evidence tending to show that the trust fund referred to had eventually been invested in this lot, but it was very slight. The testimony as to the possession of the land from the latter part of the year 1868, to February, 1871, when Thomas Ozmore left the state of Georgia, was very con-

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flicting. The plaintiffs in *fi. fa.* sought to show that the possession continued in the defendant by introducing his sayings, and the sayings of the tenants, made while in possession. The claimant admitted that the defendant exercised control over the lot, but alleged that it was as his tenant. The claimant objected to the admissibility of the aforesaid sayings. The objection was overruled, and he excepted.

The plaintiffs in *fi. fa.* also tendered in evidence a portion of the answer of the defendant to the libel for divorce filed by his wife, made in November, 1869, in which he refers to the value of the crop on the lot in controversy. He speaks of the land as his own, and refers to claimant's interest in the crop. This evidence was also objected to. The objection was overruled, and claimant excepted.

The jury found the property subject. A motion for a new trial was made upon the following grounds, to-wit:

1st. Because the court refused to charge as follows: "If the jury believe from the evidence in this case that Thomas Ozmore, the defendant in *fi. fa.*, was the guardian of his children, and that he was indebted to them as guardian, and that he became insolvent, the children are entitled to a preference over creditors to whom he became indebted after the trust funds came into his hands. And if Thomas Ozmore turned over this lot of land to the children, at a fair price, in part payment of the indebtedness to his children, whether by deed or by delivery of possession to them, then they are entitled to hold it as against the plaintiffs in this case." Upon which ground the court remarks as follows: "I did charge the jury that if Thomas Ozmore was indebted to his children, either as guardian or trustee, and turned over the land in payment or part payment of such indebtedness, either by deed or by delivery of possession to them, prior to the levy of the attachment, then they are entitled to hold it as against the plaintiffs in this case, but refused to charge the first clause of this request."

2d. Because the court erred in refusing to charge, without qualification, as follows: "If the jury believe from the evi-

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dence that Thomas Ozmore held funds in his hands in trust for his wife and children, and that the lot of land in dispute was purchased by Thomas Ozmore with that money, then he held the land in trust for his wife and children, and if, after her death, he turned over the land to the children, then they are entitled to hold it as against his creditors." This request the court charged, with the qualification that if the land was turned over to the children before the levy of the plaintiffs' attachment, the principle was correct.

3d. Because the court erred in admitting the sayings of the tenants on said lot as to the landlord under whom they held.

4th. Because the court erred in admitting the part of the answer of the defendant, Thomas Ozmore, to the libel for divorce filed by his wife.

5th. Because the verdict was contrary to the law and the evidence.

The motion was overruled, and claimant excepted.

H. & I. L. FIELDER, for plaintiff in error.

A. HOOD; B. S. WORRILL, for defendants.

McCAY, Judge.

• 1. An important question on the trial in this case was the nature of the possession of Thomas Ozmore, from the date of the alleged *turning over* of this land to his children until he left the state. Was he the tenant of his children, or was he holding in his own right? The plaintiffs insisted that the deed made after the date of the levy was the true time of his settlement with his children, and that their claim to the land then began. The claimant insisted that more than a year before this the settlement had been made, the land in dispute *turned over*, and that Thomas Ozmore held possession from then until he left, as *the tenant* of the children. Was or was it not competent to prove by the sayings of Thomas Ozmore, made during this period and whilst he was in possession, that he was not holding as the tenant of his children, but in his own right? The Code, section 3774, provides that the "dec-

larations of a person in possession of land in favor of his own title are admissible to prove his adverse possession." Under this rule, it seems plain that the declarations of Thomas Ozmore were admissible. He was in possession of the land, and they are in favor of his own title; they were pertinent, and showing that he did not hold as the tenants of his children, but adversely, not only to them, but to the world. So, too, as to the negroes; they were in possession, and the first clause of this same section declares that the declarations of a person in possession in disparagement of his own title are admissible in favor of any one, and against privies. They are declarations limiting their own possession and stating who was their landlord. We do not think these declarations would have been admissible to show title in Thomas Ozmore; but they were admissible on the great point at issue, to-wit: whether Thomas Ozmore was the tenant of his children before the date of the levy of the attachment.

2. The court was right in his charge, that to make the claimant's title good the land must have passed out of Thomas Ozmore before the levy. However fair the sale may be, though it be for cash and with the most innocent intentions, it cannot be that a sale of property by the defendant, after the levy of an attachment upon it, can be good against the levy. The property is in the hands of the law, and an attachment on land would be utterly valueless if this were the law. The attachment and the levy is in the nature of *lis pendens*, the officer, by his levy, has impounded the property, and whatever right the defendant has must await the disposal of the court. The doctrine of *lis pendens* does not stand so much upon notice as upon the necessity that the proceedings of a court shall not be capable of being trifled with by the action of the party proceeded against.

3. We think the court erred in refusing the whole of the second request to charge. If this property was in fact bought with trust money—that is, with money belonging to the defendant's children, then in equity, the land was theirs even before it was turned over to them, and it was not subject to the

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debts of the father, even though the formal title was in him. Creditors are not purchasers. Even a secret equitable title may be set up against a judgment. But though the court was in error in limiting the right of the claimants, even if the land was bought with their money, we do not feel authorized to disturb the verdict, because the evidence is overwhelming that it was not so bought. The only witness testifying in favor of this idea is the daughter, Mrs., and her testimony is very loose and plainly *inferential* rather than a statement of facts. She states plumply, it is true, that she saw her grand-father, place \$800 00 in her mother's hands before her death, and she died in 1856. Her statement that this money was invested in a certain place, and that place sold, and this bought with the proceeds is, as we have said, plainly a statement of her conclusions. According, too, to another gloss she gives of the transaction, it was part of the arrangement at the time, that Thomas Ozmore was to buy the land and be in debt to his children, they to take the land if he failed to pay. But these statements were contrary to the plain terms of the deed, contrary, also, to the settlement alleged to have been made over a year before the deed, and contrary to the evidence of Thomas Ozmore in his interrogatories. All these state positively that all parties recognized the land as belonging to Thomas Ozmore, that it was conveyed or turned over to the children in *payment of a debt he owed them as their guardian*. In none of these transactions or testimony, is anything said or intimated to the effect that the land already belonged to the children because it was bought with *another* trust fund in Thomas Ozmore's hands. Indeed, we are not sure but that by accepting the deed, according to the terms of it, they do not estop themselves from saying the land was in truth already theirs on other grounds, and independently of the debt due by the guardian. We are, therefore, of the opinion that the court did not err in refusing the new trial. The error was not one which, had it not been committed, was of so serious a character as probably to affect the verdict.

Judgment affirmed.

The Mayor, etc., of Atlanta vs. The Central Railroad Company.

THE MAYOR AND COUNCIL OF THE CITY OF ATLANTA,
plaintiff in error, *vs.* THE CENTRAL RAILROAD AND
BANKING COMPANY *et al.*, defendants in error.

1. The demurrer, not having been filed by the defendant at the first term of the court, came too late at the trial term.
2. Where the charter of a municipal corporation provides for the assessment of the damages to the owners of lots taken for public use, with the right of appeal by the dissatisfied party to the superior court, it is constitutional.
2. The advantage derived by the owner of land, by reason of its having been taken for public use, cannot be set off against the actual value of the same; but such advantage may be considered in estimating other damage than that resulting from the mere taking of the land.
4. The state of Georgia purchased a tract of land for the purpose of the erection of car-shops and other buildings necessary to the successful operation of the Western and Atlantic Railroad. The mayor and council of the city of Atlanta, under the general authority of their charter to lay out streets, etc., and section 965 of the Code, sought to appropriate a portion of said land for a street:

Held, that such contemplated action was properly enjoined.

Equity. Demurrer. Municipal corporations. Constitutional law. Eminent domain. State. Before Judge HOPKINS. Fulton Superior Court. October Term, 1873.

For the facts of this case, see the decision.

COLLIER & COLLIER; P. L. MYNATT; W. T. NEWMAN,
city attorney, for plaintiff in error.

A. W. HAMMOND & SON; JULIUS L. BROWN, for defendants.

WARNER, Chief Justice.

This is a bill filed by the complainants against the defendant, praying for an injunction to restrain it from opening a street across a certain described strip or plat of land in the city of Atlanta. The complainants allege that a portion of the land over which the street is to be opened is the property of the state, purchased by her from the Macon and Western

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Railroad Company, for the purpose of giving room for her car-shops and other new and substantial buildings, and for the purpose of carrying on the other business of her Western and Atlantic Railroad, of which the state is the owner. The injunction prayed for was granted. The bill did not waive discovery from the defendant, and it failed to answer. When the cause came on to be heard, the defendant, by its counsel, filed a demurrer to the bill, which the court decided came too late, not having been filed at the return term of the bill, to which the defendant excepted. The court allowed the defendant to make a motion to dismiss the bill for want of equity, which was done, and after argument had upon that motion, it was overruled. The defendant made no further motion in the case, and on the filing the affidavit of one of the complainants, as required by the Code, an order taking the bill *pro confesso* was granted, and a decree rendered making the injunction prayed for perpetual, whereupon the defendant excepted.

1. The demurrer not having been filed by the defendant at the first term of the court, it came too late at the trial term of the bill: Code, sec. 4191.

2. Two questions are made by the record in this case: First, whether the charter of the defendant under which it claims the right to take private property for the purpose of opening, laying out, widening, straightening, or otherwise changing the streets and alleys in the city of Atlanta, is a valid constitutional law? Second, whether the defendant has the power and authority delegated to it to take the property of the state, purchased by her for a specific object, for the purpose of opening and laying out a street through or over it, without first having obtained special authority from the state to do so? The 11th section of the act of 1859, which confers the authority on the mayor and city council of the city of Atlanta to open and lay out, to widen, straighten, or otherwise change streets and alleys, provides that whenever the said mayor and council shall exercise the authority to them delegated, they shall appoint two freeholders, and the owner or owners of the

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lots fronting on said streets or alleys, shall, on five days' notice, appoint two freeholders, who shall proceed to assess the damages sustained, or the advantages derived, by the owner or owners of said lots in consequence of the opening, widening, straightening, or otherwise changing said streets or alleys, and in case said assessors cannot agree, they shall select a fifth freeholder; the said assessors to take an oath that they will faithfully discharge their duties, and either party to have the right to enter an appeal to the superior court of Fulton within ten days from the rendition of said award; the mayor and council of said city of Atlanta to have power and authority to levy, collect and enforce the final award or judgment, in each and every case, by execution against the owner or owners of said lots, where the same is found to be advantageous to said owners. The act provides for the appointment of assessors to assess the damages sustained, or the advantages derived, by the owners of lots in consequence of the opening of streets, etc., and provides for an appeal to the superior court within ten days from the award of the assessors. It is true, the act does not, in express terms, declare in what manner the judgment on the appeal trial shall be enforced for the damages sustained by the owner of the property taken, but the legal intendment of the act, in view of the general law of the state, undoubtedly is, that it should be enforced in the same manner as other common law judgments are enforced. When the actual damage sustained by the owner of the property taken, in consequence of opening the streets, (wholly independent of the benefit or advantage derived by the owner,) shall have been ascertained by the award or judgment of the superior court, on appeal, as provided by the act, such damage must be paid before the city can proceed to take possession of the owner's property and appropriate it for the use of the public as a street. Until the actual value of the land, or other property taken for the use of the public, has been paid for, the owner thereof may stand upon his legal rights thereto, and assert the same in the courts, by any appropriate remedy. Inasmuch, therefore, as the defendant's charter provides a

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lawful mode to ascertain the actual damage sustained by the owners of lots taken for streets in the city by an appeal to the superior court in which a legal and impartial judgment can be rendered, we are of the opinion that the defendant's charter is not unconstitutional and void. This case differs from that of *The Southwestern Railroad Company vs. The Southern and Atlantic Telegraph Company*, 46 *Georgia Reports*, 43. In that case there was no provision made in the act of the general assembly for an appeal to the superior court, and no provision made whereby the damages sustained could be ascertained by the judgment of any court according to the law of the land.

3. In the case of *Jones vs. The Wills Valley Railroad Company*, 30 *Georgia Reports*, 43, and in the case of *The Selma, Rome and Dalton Railroad Company vs. Redwine*, 51 *Georgia*, 470, this court held that the benefit and advantage derived by the owner of land when taken for the use of the public, could not be set-off against the actual value of the land taken as part payment therefor; but if the owner of the land so taken, sustained other damage over and above the actual value of the land taken for the use of the public, then the benefit and advantage derived by the owner might be considered in estimating the amount of such other damage so claimed over and above the actual value of the land. According to this ruling of the court in the cases before cited, so much of the defendant's charter as provides that the mayor and council of the city shall have power and authority to levy, collect, and enforce the final award or judgment in each and every case, by execution against the owner or owners of said lots when the same is found to be advantageous to said owners, is illegal and void.

4. Has the city of Atlanta, a municipal corporation created by the state, and deriving all its privileges therefrom, the power and authority under its charter to take the property of the state, owned by her, and purchased for a specific object, as alleged in the complainant's bill, for the purpose of appropriating the same for a public street? The land of the state

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sought to be appropriated by the city for a street, was purchased by her to give room for her car shops and other substantial buildings, for the purpose of carrying on the business of her state railroad. It is true the state has leased her road for a term of years, but she is the owner thereof; the fee simple title thereto is still in her as the sovereign of the people of the whole state, including the city of Atlanta. This case presents the extraordinary spectacle of the *creature* of the state attempting to exercise its power and authority derived from the state against the state herself, without her consent. This claim is based on the 965th section of the Code which declares that all the public road laws and penal laws touching the railroads of this state, whether to obligate or protect, apply to the state road, unless specially excepted or some other provision is prescribed in lieu of some one or more thereof. The laying out the street in question is not simply crossing the track of the state road but it appropriates the land of the state, purchased and owned by her, to give room for her car shops and other buildings, for the purpose of carrying on the business of her road. The argument for the defendant is, that inasmuch as the land was purchased by the state and owned by her for the purpose of carrying on the business of her railroad, therefore the defendant has the right to open a street over and through it under the provisions of the Code, before cited. To lay out a road or street across the state's railroad track is one thing; to appropriate the land purchased and owned by the state for the erection of car shops and other buildings to carry on the business of her railroad, without her consent, is another and different question. With equal propriety and claim of right could the defendant, under the pretext of widening Marietta street, take ten feet of the state capitol building, purchased to transact the public business of the state, as to take the land in question purchased to carry on the business of her railroad. If the defendant has not the power and authority to take the one, without the expressed consent of the state, neither has it the power and authority to take the other, without the express authority of the state to

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do so. In delegating the power and authority to the defendant to lay out streets, etc., for the benefit of the city, the state cannot be presumed to have granted the power and authority to do so as against her own sovereign rights over her own property without first having obtained her consent. In view of the facts as disclosed by the record in this case, we find no error in the judgment of the court in granting a perpetual injunction restraining the defendant from laying out the street over and through the property of the state, or any part thereof, as specified in the complainant's bill.

Let the judgment of the court below be affirmed.

JOHN HILL, plaintiff in error, vs. THE STATE OF GEORGIA,
defendant in error.

1. As a general rule, a jury may, if the evidence justify it, find the defendant guilty of the attempt under an indictment charging the actual commission of a crime.
2. When the penalty fixed by law for an offense is neither death nor imprisonment in the penitentiary, not less than four or not less than two years or not exceeding one, or fine not exceeding \$500 00, or imprisonment, or both, there is no penalty prescribed by law for an attempt to commit such offense.

Criminal law. Indictment. Attempts. Penalty. Before Judge KNIGHT. Cherokee Superior Court. February Adjourned Term, 1874.

John Hill was indicted for the offense of incestuous fornication. The jury found him guilty of an attempt to commit the crime charged. He moved in arrest of judgment upon the following grounds:

1st. Because the jury could not, under the pleadings in this case, find the defendant guilty of anything more or less than what was charged in the indictment.

2nd. Because the law prescribed no penalty for an attempt to commit incestuous fornication.

The motion was overruled and the defendant excepted.

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WOFFORD & MILNER, by JACKSON & CLARKE, for plaintiff in error.

C. D. PHILLIPS, solicitor general, for the state.

McCAY, Judge.

1. The Code, in terms, section 4675, provides that in all cases, the jury may, if the evidence justify it, find the accused guilty of "the attempt," when the indictment charges the actual commission of an offense. Perhaps this general provision does not apply to cases where the attempt is, by express words, made a defined offense; but we can see no meaning to the general words of this section, unless it be as we have said, and doubtless, the *general* provisions of section 4712, purporting to fix the penalty for all attempts, according to the dignity of the actual crime, was drawn in view of this other provision, permitting the jury to find the attempt in all cases. We are clear, therefore, that the verdict is right in this case, supposing the evidence to have justified the finding.

2. But we are equally clear that, under the Code, there is no penalty prescribed for an attempt to commit this crime. Section 4712 provides penalties for attempts as follows: 1st. Where the penalty for the actual crime is death. 2d. Where it is *not less* than four years confinement in the penitentiary. 3d. Where the penalty is *not less* than two years. 4th. Where it *does not exceed* one year. 5th. Where the penalty is a fine of not *exceeding* \$500 00, or imprisonment in the common jail, or both. The penalty for incestuous fornication is, by section 4533, *not less* than one nor more than three years. None of the provisions of 4712 fit this case. The penalty here is less than four, less than two, (or may be,) and it *exceeds* one. The codifiers, by a change of the manner of expressing themselves, by using the words *not less* in the first, second and third clauses of the section, and in the fourth clause using the words *not exceeding*—have, by a careless use of words,

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failed to provide a penalty for an attempt to commit an offense punishable by imprisonment from one to three years. Had they kept up to the end the form of expression used in the first, second and third clauses, they would have covered all cases, but by this change they fail to include the case at bar. Nor does section 4455 meet the case. Evidently the general provisions of that section have reference to crimes against the *public peace*, as riot, affray, etc., and not to offenses which, by being crimes, are technical breaches of the peace, though done in the utmost privacy. It is true that, under this view of the subject, there are, perhaps, various other attempts to commit crime for which there is no penalty, and we greatly regret that our convictions have driven us to the conclusion at which we have arrived; but we have no power to make law. The rule that criminal statutes are to be construed strictly, is hoary with age, and has the uniform sanction of all courts. We decided in *Gibson vs. The State*, 38 *Georgia*, 571, that if a statute failed to fix a penalty for an offense, none could be inflicted. The judge is a mere agent of the law. He has no discretion except as it is given him. The *penalty* is affixed *by law*. A crime is a felony or not, according to the penalty fixed by the legislature; and it is not within the province of the courts to help out the legislature. Under our system, that body has exclusive jurisdiction over the subject, and if, by mistake or otherwise, it has failed to provide for the punishment of a crime, it must go unpunished. We hope this mistake will be corrected at the very next session. It is a very glaring one, but it is not for the courts to remedy.

Judgment reversed.

Cohen & Menko *vs.* The Southern Express Company.

COHEN & MENKO, plaintiffs in error, *vs.* THE SOUTHERN EXPRESS COMPANY, defendant in error.

1. Where the evidence disclosed that an express company received the goods of the plaintiff at Savannah, for the purpose of transportation to the city of Atlanta, and that the same were not transported, it was error in the court to award a non-suit.
2. Whether the defendant can protect itself from its common law liability as a common carrier for the loss of the plaintiffs' goods, by showing that it received them under a contract made with another company, or as the agent of another company, or whether the plaintiffs had the right to elect to sue either company for the loss of their goods, are questions not now before the court.
3. A non-suit was awarded in the superior court, and such a decision was brought by writ of error, to this court, without any *supersedeas* having been obtained, where the judgment aforesaid was affirmed:
Held, that a second suit, commenced within six months from the date such affirmance was made the judgment of the superior court, but after the expiration of six months from the date of the decision awarding a non-suit, came within the provisions of section 2932 of the Code.

Common carriers. Contracts. Non-suit. Statute of limitations. Before Judge HOPKINS. Fulton Superior Court. April Term, 1874.

For the facts of this case, see the decision.

P. L. MYNATT; COLLIER & COLLIER, for plaintiffs in error.

1st. As to question of non-suit, see 2 Kernan, 343; 2 Red. on Railways, 17, 18, 239; Shear. & Red. on Neg., 54; Code, sec. 3258; 19 N. H., 337; 28 Vt., 268; So. Ex. Co. *vs.* Chapman & Urquhart, decided January term, 1874; 6 Binney 129; 6 How., 344; Story on Bail., sec. 538.

2d. As to statute of limitations, see 32 Ga. R., 448; 44 *Id.* 659; Code secs. 2896, 3476.

A. W. HAMMOND & SON, for defendant.

1st. The first non-suit was granted on the 14th of June, 1871, and the suit was recommenced 3d July, 1872, for a loss in November, 1865. It was barred: Code, secs. 2923, 3059,

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aided by sec. 2932. There was no *supersedeas*, and therefore, it is unnecessary to discuss the effect of going to supreme court. See *Allen, Ball & Co. vs. Mayor and Aldermen of Savannah*: 9 Ga. R., 286.

2d. Plaintiffs contracted with the Adams Express Company to ship to Atlanta, and have no cause of action against the Southern Express Company on contract: *So. Ex. Co. vs. Shea*, 38 Ga. R., 519; *Cohen & Menko vs. So. Ex. Co.*, 45 Ga. R., 148; *So. Ex. Co. vs. Palmer & Co.* 48 Ga. R., 85.

3d. There was no *wrongful* taking by defendant. Plaintiffs intended that the Adams should deliver to defendant to be sent to them: *So. Ex. Co. vs. Palmer & Co.*, 48 Ga. R., 85—93 *et seq.*, and same case unpublished. There was no conversion: *Liptrot vs. Holmes* 1 Kelly, 391. There was no demand and refusal: *The Rome R. R. Co., vs. Sullivan, Cabot & Co.*, 14 Ga. R., 283, 284: See also *Brown's Actions at Law*, side page 443, and cases cited. 1 *Campbell's R.*, 441; 2 *Saund. R.*, 47

WARNER, Chief Justice.

This was an action brought by the plaintiffs against the defendant as a common carrier, alleging that on the 26th of October, 1865, in the city of Savannah, Georgia, they caused to be delivered to the defendant certain described goods, of the value of \$4,000 00; that the defendant then and there accepted and received said goods from the plaintiffs, to be safely carried and conveyed by defendant from said city of Savannah to the city of Atlanta for a certain reasonable reward; that the defendant, neglecting its duty as such common carrier, so negligently and carelessly demeaned itself in the premises that said goods were wholly lost to the plaintiffs, to their damage as aforesaid. It also appears from the record that the plaintiffs had commenced a former action against the defendant to recover damages for the loss of the same goods now sued for, on the trial of which the plaintiffs were non-suited; thereupon, the plaintiffs sued out their writ of error to this court within the time prescribed by law, and on the hearing thereof

here, the judgment of the superior court awarding the non-suit was affirmed, and the judgment of affirmance by this court was made the judgment of the court below on the 8th of April, 1872. The present action was commenced within six months after the judgment of this court affirming the judgment of non-suit was made the judgment of the court below, but not within six months from the time the non-suit was first awarded in the superior court. The defendant pleaded the statute of limitations in bar of the plaintiffs' action. After hearing the evidence in the case, the court, on motion of defendant's counsel, non-suited the plaintiffs, but on what ground, does not appear; whereupon, the plaintiffs excepted.

1. The evidence in the record shows that the goods were in the possession of defendant, and that the same were lost, or greatly damaged, whilst in its possession. The defendant demanded of plaintiffs \$68 00 for freight on the goods, and general average. The plaintiffs also proved their ownership of the goods, the loss of a part thereof, and damaged condition of the remainder. It also appeared that the plaintiffs had purchased the goods in New York city, and ordered the same to be shipped to them at Atlanta by Adams Express Company, expecting the goods would be sent by the inland route, by Lynchburg. The judgment of non-suit, it is insisted here, was right, on two grounds: 1st. According to the rulings of this court in Shea's case, 38 *Georgia Reports*, 519, and in the case of *Cohen & Menko vs. The Southern Express Company*, 45 *Ibid.*, 148; and, 2d. Because the plaintiffs' demand was barred by the statute of limitations. In Shea's case, the plaintiff sued the Southern Express Company for the loss of his goods under its common law liability as a common carrier, and on the trial proved an express contract made with the Adams Express Company, a distinct corporation, to transport the same goods from New York to Macon, the point of destination, for the purpose of establishing the defendant's liability for the loss of the goods. This court held that the plaintiff could not establish the defendant's liability as a common carrier, on its contract implied by law, by offering in evi-

dence an express contract made with another company for the transportation and safe delivery of the same goods, any more than if the plaintiff had sued John Doe on his implied contract as a common carrier for the loss of his goods, and had proved at the trial that he had made an express contract with Richard Roe for the transportation and safe delivery of the same goods. The express contract offered in evidence by the plaintiff to sustain his action against the defendant in that case, established the liability of the Adams Express Company to him for the safe delivery of the goods at the point of destination, and not the liability of the Southern Express Company under that evidence. It was held by this court that by the contract offered in evidence by the plaintiff in that case, that the Adams Express Company, as a common carrier, undertook safely to deliver his goods at Macon, either by itself or competent agents. The Adams Express Company had the right to select the Southern Express Company as its agent to complete the transportation of the goods, or any other agent, and if the goods were lost whilst in the possession of such agent, the Adams Express Company would be liable for such loss, under its contract with the plaintiff, as proved by his own evidence on that trial, and such was substantially the holding of this court in the Shea case, and such was, in substance, the ruling of the court in this case when it was before us on a former occasion. The plaintiffs then, as in the Shea case, offered in evidence the express contract made with the Adams Express Company to establish their right to recover in their suit against the defendant, and for that reason this court sustained the non-suit in that case, holding, as in the Shea case, the plaintiffs could not recover when they had sued the defendant upon its common law liability as a common carrier, for loss of the plaintiff's goods, when they offered in evidence to establish that liability an express contract made with another company for the transportation and safe delivery of the same goods. The plaintiffs in the former suit declared upon one contract made with the defendant, and to establish it offered in evidence an express contract made with the Adams Ex-

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press Company, a distinct corporation, for the transportation and safe delivery of the same goods. This court never has decided that the defendant would not have been liable to the owners of the goods received by it at Savannah as a common carrier, upon proof of possession of the goods as such common carrier, and loss of the same whilst in its possession for transportation, either as the agent of the Adams Express Company or as the agent of any other company, in the absence of any evidence on the part of the plaintiffs of an express contract with another company to transport and safely deliver the same goods for which they sued the defendant. All that this court decided in the two cases cited was, that the plaintiffs could not recover against the defendant on the evidence then offered by them to establish its liability. It is a general principle applicable to common carriers, that when a duty is imposed on them by law, an action may be sustained against them by any person who is specially injured by their failure to perform that duty. The evidence in this case shows that the defendant had the possession of the plaintiffs' goods, as a common carrier, to transport the same from Savannah to Atlanta. The law imposed the duty upon the defendant to transport and safely deliver the same to the plaintiffs, which the evidence shows it failed to do, and, therefore, under the law and evidence in the case, the plaintiffs were entitled to recover damages from the defendant for the loss of their goods. The plaintiffs did not offer in evidence in this case any express contract made by them with any other company for the transportation and safe delivery of their goods, as in the Shea case, or as was done by them on the first trial of this case, and therefore the judgment of non-suit cannot be sustained by the decisions of this court, on the statement of facts contained in this record.

By a careful examination of the facts as disclosed by the plaintiffs' evidence in the Shea case, and in Cohen & Menko's case, and the judgments of this court thereon, it will be perceived that it was held in both cases that the plaintiffs could not recover of the defendant, because, in each case, the plaintiffs showed, by their own evidence, that they had made an ex-

press contract with another company for the transportation and safe delivery of the same goods. Assuming that the contract for the transportation and safe delivery of the goods was made with the Adams Express Company, as the evidence offered by the plaintiff in the Shea case showed it to have been, the court expressed its opinion as to the liability of that company, under that contract, as proved by the plaintiff in that case. The court expressed no opinion as to what would have been the liability of the defendant, as a common carrier, to the plaintiff for its undertaking to transport and safely deliver his goods from Savannah to Macon as the agent of the Adams Express Company, or as the agent of any other company, in the absence of the plaintiff's own evidence as to the express contract made with the Adams Express Company for the transportation and safe delivery of the same goods for which he sued the defendant.

2. Whether the defendant can protect itself from its common law liability as a common carrier for the loss of the plaintiffs' goods, by showing that it received them under a contract made with another company, or as the agent of another company, or whether the plaintiffs had the right to elect to sue either company for the loss of their goods, are questions that are not now before us.

3. Was the plaintiffs' second action commenced within six months after the judgment of non-suit, as contemplated by the 2932d section of the Code? It is declared by that section that if a plaintiff shall be non-suited, or shall discontinue, or dismiss his case, and shall recommence within six months, such renewed case shall stand upon the same footing as to limitation with the original case. Did the six months commence to run against the plaintiffs in this case from the time the judgment of non-suit was first awarded in the superior court, or from the time the judgment of this court upon the writ of error was made the judgment of the court below? The statute evidently contemplates that the judgment of non-suit should be a *final* judgment, otherwise the plaintiffs' case would not be out of court. What is a final judgment? Final

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judgments are such as at once put an end to the action, by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for: 3 Blackstone's Commentaries, 398. When the judgment of non-suit was awarded by the court, the plaintiffs excepted to that judgment within the time prescribed by law, and brought the case before this court for a further hearing, as they had the legal right to do. Until the judgment of this court was rendered upon the writ of error, affirming the judgment of the court below, and made the final judgment of that court, the case was pending, and if the judgment of non-suit had been reversed, the case would have continued pending in the court. The judgment of non-suit, was not *final* in the sense of the law, until the judgment of this court, affirming the judgment of the court below, was made the judgment of that court, and the six months commenced running against the plaintiffs from that time, and not before. In our judgment, in view of the facts contained in the record, the court erred in non-suiting the plaintiffs' case.

Let the judgment of the court below be reversed.

JOHN G. D. PITTMAN, plaintiff in error, *vs.* ELIZABETH JONES *et al.*, defendants in error.

[TRIPPE, Judge, was providentially prevented from presiding in this case.]

There was no error in the judgment of the court overruling the *certiorari* in this case. It is to be presumed that the officer made an entry of service, and the defendant having been present at the court and notified of the pendency of the suit, it is too late, under section 3340 of the Code, to contest the official return of service made by the bailiff.

Judgment. Service. Officer. Presumption. Before Judge STROZER. Quitman Superior Court. November Term, 1873.

Elizabeth Jones and Debby Jones brought suit in the justice court for the one thousand one hundred and ninety-fifth district, against John G. D. Pittman, on a note dated May

16th, 1873, payable one day after date to plaintiffs or bearer, for \$32 17. The usual notice of suit was served upon the defendant, except the justice failed to sign it. At the trial term, the defendant was present and was asked if he had any defense, to which he made no response. Judgment was then rendered for the amount sued for. To the execution based thereon, the defendant filed an affidavit of illegality, to the effect that he never had had any legal notice of the suit in which the judgment was obtained, and that he did "not know of any note he gave except for \$30 00."

The record does not show any official entry of service, though the petition for *certiorari* states that the defendant proved by the bailiff that the notice of suit above referred to was the only one served on him.

On the trial of the illegality, the court amended the judgment by making it stand for \$30 17, and ordered the execution to proceed for that amount. To this ruling the defendant excepted, and filed his petition for *certiorari*. The writ was ordered to issue, but upon the final trial, the judgment of the justice was affirmed, and defendant excepted.

JOHN T. CLARKE; J. H. GUERRY, for plaintiff in error.

No appearance for defendant.

McCAY, Judge.

The record does not contain a copy of the proceedings in the justice court, nor it is very clear what was the real point of the plaintiff in error in his affidavit. As, however, it is stated that he was not *legally* served, it is but fair to presume that there was a legal summons issued, and that it was the copy served on him that was deficient. Had the objection been to the original process the true ground would have been that there was no process. Assuming, then, that the original was right, that it was signed by the magistrate, and that the constable, in good faith, thought he had served a true copy, it follows that the constable made a return accordingly. As the

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case stood then on the trial of the affidavit of illegality, there was, first, as a part of the record, the bailiff's return of service, and it was for the defendant in the suit to traverse that. By the common law this could not be done. Such an entry was conclusive, and except for the provision of the Code, section 3340, the issue would necessarily be decided against the defendant in the execution. To give his proof any weight at all he must bring himself within the provision of the Code. That is, he must show that he has made his objection at the first term after notice of such entry. The plaintiff in error had every reason to suppose the bailiff would make such an entry, and, at the time of the judgment, he was informed such a suit was pending and was about to go into judgment against him. We think this was fair notice of the entry, and that he should then have attacked it and traversed it. We do not mean that his presence in court was an appearance so as that he would be bound by the judgment, whether served or not, but that he is not allowed by law to contest the return, because he was fully aware that such a return was made, and he failed at the proper time to traverse it. After that failure it became, as to the parties to that suit, conclusive, and the law will not permit the defendant to deny it. He is remitted to his remedy against the officer if he has been hurt by his false return. It may be thought that this is a very technical view of the case, and that is true. But the defendant in the execution comes into court on a purely technical ground. He had as complete a notice of the suit as though the copy had been complete. This claim to set aside the judgment stands solely on the ground that the copy was not a true copy, because it wanted the copy of the magistrate's name, a mistake purely clerical. He has no right to complain if he is judged by technical rules on this technical objection; and we affirm the judgment.

Judgment affirmed.

JOHN H. NOLAN, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

1. Consent of counsel that should the jury agree that night, they might return a sealed verdict to the clerk and disperse, cannot be construed to extend to a verdict found on the next day.
2. It was the legal right of the defendant to be present when the verdict was rendered, and had a motion to set aside such verdict been made on the ground of his absence, it should have been granted.
3. It has never been the practice of the courts of this State to require the fact of the defendant's presence at the time of the rendition of the verdict, to be entered on the record and made a part thereof. The absence of such entry is therefore no ground for arresting the judgment.

Criminal law. Verdict. Practice in the Superior Court. Record. Before Judge SCHLEY. Chatham Superior Court. November Special Term, 1874.

For the facts of this case, see the decision.

A. P. ADAMS; S. B. ADAMS; HENRY B. TOMPKINS, for plaintiff in error.

ALBERT R. LAMAR, solicitor general, for the state.

WARNER, Chief Justice.

1. The defendant was indicted for the offense of murder, and on the trial thereof, the jury returned a verdict finding him guilty of voluntary manslaughter. When the jury were out the night before the verdict was returned, the defendant's counsel consented that if the jury should agree that night they could return a sealed verdict to the clerk and disperse. The jury did not agree upon a verdict that night, but on the next day brought in their verdict, which was received in the absence of the defendant and his counsel. The defendant made a motion in arrest of judgment on that ground, which motion was overruled by the court, and the defendant excepted. The consent of the counsel cannot fairly be construed to extend to the next day, especially in a criminal case.

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2. That it was the legal right of the defendant to have been present when the verdict was rendered by the jury, we entertain no doubt, and if a motion had been made to set aside the verdict on the ground of his absence, that motion should have been granted by the court. The defendant, however, did not make a motion to set aside the verdict, but made a motion in arrest of judgment. The 4629th section of the Code declares that no motion in arrest of judgment shall be sustained for any matter not affecting the real merits of the offense charged in the indictment. A motion in arrest of judgment is predicated on some defect which appears on the face of the record or pleadings.

3. It has never been the practice of the courts of this state, so far as we know or are advised, to require that the fact of the defendant's presence at the time of the rendition of the verdict, should be entered on the record, and made a part thereof. If the defendant is not present when the verdict is rendered, that is a fact *extrinsic* of the record, and may be shown on a motion to set aside the verdict for that reason.

Let the judgment of the court below be affirmed.

ANN E. RUTHERFORD, plaintiff in error, *vs.* WILLIAM L. CRAWFORD, defendant in error.

(TRIPPE, Judge, was providentially prevented from presiding in this case.)

1. Under the acts of 17th of March, 1866, pamphlet, 22, and 17th of March, 1866, pamphlet, 71, passed in pursuance of the constitution of 1865, the jurisdiction of the inferior court as a court of law over civil cases was abolished, and the cases upon all its dockets transferred to the county court, and, under these acts, it was competent for the clerk of the county court, on the 1st of January, 1868, to issue an execution on a legal judgment obtained in the inferior court, on which no execution had been issued.
2. An entry made by a deputy sheriff, or by his direction, in his presence, upon an execution, of a levy on a described lot of land, with intent then and there to devote the land to sale under the execution, but

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by mistake not signed by him, is a good levy if the signature be attached during the official term of the deputy sheriff, or if the same be not signed during his term, the entry may be afterwards perfected, under an order of the court, or the mistake may be shown by evidence, on a trial in which the validity of the levy may be in question, but it is not competent for the deputy, after his term has expired, or whilst he is the deputy of a succeeding sheriff, to perfect said entry by signing the same.

3. The proceedings of a court of record can only be shown by the records, unless they be lost or destroyed, and if, upon the production of the minutes of the inferior court, it appears that there is no record of the swearing and impanneling of a jury at a certain term of said court, a verdict entered upon the minutes at said term is, *prima facie*, void, as well as a judgment entered up thereon.
4. Whether such defect can be corrected by an entry *nunc pro tunc*, on motion in the proper court, as against a purchaser from the defendant, or against one who has subsequently obtained a lien, *quære?*

Inferior Court. County Court. Execution. Levy. Sheriff. Records. Minutes. Before Judge STROZER. Quitman Superior Court. November Term, 1873.

At the February term, 1865, of Quitman inferior court, William L. Crawford obtained a judgment against James Rutherford. On January 16th, 1868, the clerk of the county court issued execution bearing test in the name of the judge of said court, which, on October 24th, 1868, was levied upon certain lands as the property of the defendant. A claim was interposed by Ann E. Rutherford. Upon the trial of the issue thus formed, the claimant objected to the introduction of the aforesaid execution in evidence on the ground that it was illegally issued. The objection was overruled, and the defendant excepted.

The plaintiff then showed possession of the land by the defendant since the rendition of the judgment. The claimant proved by James Oliver that he was sheriff of said county at the date of said levy, but resigned in November, 1868; that Larkin Armstrong, whose name was appended to said levy, was his deputy; that he did not sign the same at the time it bears date; that said Armstrong moved from Clay to Quitman county in the early part of 1871; that witness brought him

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back in November, 1871, for the express purpose of having him appointed deputy sheriff that he might then sign said levy; that David Johnston, the then sheriff, appointed said Armstrong his deputy, and that he acted as such during the November term of the superior court; that during said term he signed said levy; that upon the adjournment of the court, he returned to Clay county.

It further appeared that the levy was written by the plaintiff under the direction of said deputy sheriff, at the time it bears date, but was left unsigned.

The claimant submitted to the court the minutes of the inferior court for the February term, 1865, which failed to disclose that any jury had been impaneled and sworn at that term; but the verdict appeared, signed by N. T. Christian, foreman; also, the list of the jurors drawn for that term. The court refused to determine, from inspection, that no legal verdict had been rendered, but directed counsel for claimant to read said record to the jury for their consideration. To this ruling claimant excepted.

Much other testimony, immaterial to the issues here involved, was introduced.

The jury found the property subject. A motion for a new trial was made upon the following, amongst other grounds:

1st. Because the court erred in refusing to exclude the execution aforesaid.

2d. Because the court erred in refusing to determine, by inspection, the effect of the minutes of the inferior court upon the verdict aforesaid, and in submitting them to the jury.

3d. Because the court erred in charging the jury as follows: "It is incumbent upon the party attacking the record to show affirmatively that there was no jury impaneled and sworn. If the record simply omits to show the fact, the law will presume that the court did its duty, and that the jury was impaneled and sworn."

4th. Because the court erred in the following charge: "A levy may be a good levy, notwithstanding the sheriff did not

sign it. If a levy is made and entered by the sheriff, or by his direction, it is a good levy if it is not signed."

5th. Because the court erred in the following charge: "The law, upon abolishing the inferior court, made it the duty of the county court to take up and finish the unfinished business of the inferior court, and if the judgment in this case was rendered by the inferior court on February 15th, 1865, the execution issued thereon by the county court, February 16th, 1868, was correctly issued."

6th. Because the court erred in charging the jury as follows: "If you believe that Armstrong was, in November, 1871, acting as deputy sheriff of the county, and whilst so acting, did affix his signature to said levy, it made said levy regular, and such amendment related back to the original date of the entry and made it valid from its beginning, provided he originally made said entry as his levy at the date it bears."

The motion was overruled and the claimant excepted upon each of the grounds aforesaid.

A. HOOD ; B. S. WORRELL, for plaintiff in error.

JOHN T. CLARKE; H. & I. L. FIELDER, for defendant.

McCAY, Judge.

1. By the act of 17th March, 1866, (acts of 1865-6, page 22,) all civil jurisdiction for the trial of matters involving private rights, was taken away from the inferior court by the repeal of those sections of the Code giving the jurisdiction. By another act, approved the same day, acts of 1865-6, page 71: "All suits now on the docket of the inferior courts, are transferred to the county court." The title to the act is: "To transfer all civil cases." We think the language of this act, page 71, is broad enough to transfer, not only pending cases, but final judgments unperformed. Until performed they are still fairly on the dockets, and litigation may still occur in relation to them. As the act on page 22, abolishes the civil

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jurisdiction of the inferior court, it is to be presumed that the legislature intended by the act, on page 71, to substitute the county court for it completely, and it is due to public justice to construe these acts liberally, so as to carry out the manifest purpose of the legislature. We are, therefore, of the opinion, that unperformed judgments were transferred to the county court and that the clerk had authority to issue the execution, and make it returnable to the county court.

2. A levy on land consists in the entry; that is all the seizure usual in this state. Indeed, by fair implication, such is the clear provision of law. Notice is to be given to the person in possession (Code, 3643,) and the sheriff, after the sale, is to put the purchaser in possession: Sec. 3651, Code. It is therefore of prime importance, that this entry shall be complete. It is not a mere return to the court of the officer's acts, as in the case of a levy upon personal property; it is the levy itself. It should describe the property, with sufficient distinctness to enable the purchaser to know what he is buying and to enable the officer to put the buyer in possession, and as is expressly provided by section 3640, it must be signed by the officer making it. We have held that if it be left unsigned by mistake, that is, if the entry be made with intent then to make a levy and the description be complete, it is competent for the officer to complete it by correcting his failure. But *prima facie*, it is no levy. The entry may have been left unsigned with intent to do so. The intention to levy may be incomplete. Some further instruction or information may be sought, etc., and if this be so, the levy is not made. We do not think the facts, as presented by this record, make out the case of a complete levy. The *signature* by the officer after his term of office is ended, is nothing. It is not official. He is not under oath. His bondsmen would not be liable for malfeasance in the act. And he cannot, when in office, as the deputy of a new officer, complete his acts under his former principal. We think, however, the facts, the truth of the case might, under our law, which gives the court of law equitable jurisdiction, have been shown by evidence at the trial, and if the levy

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was in fact made, with intent then to devote the property to sale, and the failure to sign at the time was a mere accident, a clerical misprision; that the defect would be cured.

3. We know of no way to prove the proceedings of a court of record but by its records. It appears from an inspection of the record that there was no jury at the term this judgment was had. If so, there was no authority to give a judgment. Under the law, as it then stood, a verdict was necessary to have a judgment upon. It is a gross and palpable irregularity. Not a mere defect in pleading, but as appears from the record, an exercise of authority not authorized by law. Without a jury there could be no verdict, and without a verdict the attorney of the plaintiff had no right to enter up a judgment.

4. Whether this can now be corrected by an order *nunc pro tunc*, we do not say. The superior court has the custody of the record, and on a proper case might make it speak the truth. How far such a correction would affect the claimant, is another question.

Judgment reversed.

PETER BARNES, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

The verdict being sustained by the evidence, the motion for a new trial was properly overruled.

New trial. Before Judge HOPKINS. Fulton Superior Court. October Term, 1873..

A report of this case is unnecessary.

THRASHER & THRASHER, for plaintiff in error.

JOHN T. GLENN, solicitor general, for the state.

WARNER, Chief Justice.

The defendant was indicted for the offense of burglary in the night, and on the trial was found guilty by the jury. A motion was made for a new trial, which was overruled, and the defendant excepted. The only grounds for a new trial insisted on here are that the verdict was contrary to law, that the verdict was contrary to the evidence, and without evidence to support it. In looking through the evidence contained in the record, we find that there is sufficient evidence to sustain the verdict under the law, therefore the verdict was not contrary to law, nor contrary to the evidence, or without evidence to support it. The twelve jurors who passed on the facts, as proved by the witnesses on the trial, were quite as competent to do so as this court, and in contemplation of the law, better qualified to do so.

Let the judgment of the court below be affirmed.

BRAY & BROTHER, plaintiffs in error, vs. JOHN MCK. GUNN,
defendant in error.

(TRIPPE, Judge, was providentially prevented from presiding in this case.)

1. Where an agent deviated from his instructions, and forthwith informed his principal, and the principal, with full knowledge of the facts, either ratifies the act, in terms, or fails, within a reasonable time, to disapprove, the agent is not liable for the deviation from his instructions.
2. The evidence in this case justifies the verdict.

Principal and agent. New trial. Before Judge STROZER.
Randolph Superior Court. May Term, 1874.

Bray & Brother brought assumpsit against Gunn, alleging that he had damaged them \$800 00, in this, that on August 19th, 1871, the plaintiffs entrusted to said defendant for collection, a draft on J. T. Brown & Company for \$402 00; that

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on September 9th, 1871, in violation of written instructions, and to the damage of plaintiffs, he received Kimball money, a worthless currency, in payment of said draft, and released said Brown & Company from liability thereon. The defendant pleaded the general issue.

The evidence made, in brief, the following case: On August 19th, 1871, the plaintiffs enclosed to defendant, for collection, the draft in the declaration mentioned, with instructions as follows: "Which please collect and forward in New York exchange, or by express, in funds, as suits you best. Please do your best to collect it for us, but in case they do not pay it, please get them to draw on H. I. Kimball & Company, at thirty days, payable to the City Bank, at Macon, (adding two per cent. to the amount,) and send it to us, unless you want to discount it yourself—if so, you can forward as above, adding two per cent. to the amount, and take off the same."

On August 23d, the defendant answered as follows: "John T. Brown & Company say they will pay your draft between the 1st and 15th of next month. As this was a debt of Brown, Smith & Company, they want the draft drawn on them as a voucher to the new firm. Enclosed find draft."

On August 26th, plaintiffs forwarded draft on Brown, Smith & Company, repeating, substantially, the instructions contained in their first letter.

On August 28th, the defendant replied that "John T. Brown & Company say they will pay your draft on Brown, Smith, & Company, between the 1st and 15th of next month *certain*, but will not accept."

On September 9th, the defendant wrote as follows:

"I have to-day collected draft on Brown, Smith & Company,....\$402 00

"My commissions..... 2 00

 \$400 00

"This collection was made in Kimball currency, the best I could do. I have sent it to Atlanta with instructions to send to you New York exchange."

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On September 12th, plaintiffs answered as follows: "We also feel obliged for the collection from Messrs. Brown, Smith & Company, and trust that the New York exchange may be purchased with the Kimball currency at same rate as for currency."

On October 27th, 1871, the plaintiffs wrote as follows: "You will oblige us by remitting the amount of our claim vs. John T. Brown & Company, successors to Brown, Smith & Company, collected by you, say \$402.00, (less your charges for collection,) in currency, by express, or in New York or Savannah exchange."

On November 1st 1871. the defendant replied thus: "Until I received yours of the 27th ultimo, I was of the opinion you had received proceeds for your Brown, Smith & Company draft or claim. This was collected September 9th, in Kimball currency, and sent to W. H. Tuller, cashier of Atlanta National Bank with instructions to convert into New York exchange and remit to you. But it seems Kimball & Company would not redeem it. I am sorry I changed the claim; but I am honest when I say I would much prefer the Kimball currency to-day to a claim on Brown, Smith & Company, as this firm is notoriously insolvent. I guess you know George W. Smith and perhaps John T. Brown. The Company was James Buchanan, a worthy young man but not worth a dime, who is now in Arkansas. I have some Kimball currency and I am inclined to the opinion it will come up yet. The proceeds of your claim is in the hands of the Atlanta National Bank, to your credit. I think I can buy Brown, Smith & Company's paper with the Kimball currency.

"M. I. Atkins offered to give me back the note for the currency on Kimball. I am sure I meant to carry out your interest in this matter, and did for you precisely what I was doing for myself. As for selling Brown, Smith & Company's goods was something I did very little of, having lost by both Brown and Smith."

On November 4th the plaintiffs answered "In reply, we have to state that having sent you the claim for collection,

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and you having reported to us that you had collected it, it will not be expected of us to release you from liability. We still claim that you remit us the money as requested in our last. Of course we prefer that you should not be the loser in the matter, and if the new firm will execute a draft which we will approve, we will release you and look to them."

On February 1st, 1872, plaintiffs again wrote asking a settlement.

On February 5th the defendant replied as follows: "I am sorry there is a misunderstanding about the collection of Brown, Smith & Company. I reported this to you and reported the manner in which the collection was made. It seemed to meet your approval, and you so wrote me. I am sure I had no interest in the Kimball matter, but we were all taking his currency, and I wrote you I had taken it for your claim, which seemed to meet your approval, and I say now it is as good in the shape of Kimball currency as it would be on Brown, Smith & Company. If I felt that I owed this to you, I would certainly pay you. I acted for you precisely as I did for myself, which seemed to meet your approval. If it had not, if you had so expressed yourself, I could have sent you back your note very easily at the time I received your acknowledgment."

William M. Tumlin testified substantially as follows: The firm of Brown, Smith & Company was composed of John T. Brown, George W. Smith and James Buchanan; considered them insolvent about August and September, 1871. The firm of J. T. Brown & Company was solvent; it bought out the railroad contract of Brown, Smith & Company, under H. I. Kimball & Company, and assumed part of their debts, amongst which was the claim of plaintiffs. The money in which said draft was paid (Kimball currency) was current and at par in this community about August and September, 1871. No payment would have been made unless such currency had been taken. Kimball failed in September or October; thinks in the latter month. After that such currency was worthless.

The defendant corroborated Tumlin as to the currency of

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the Kimball money at the time the draft was paid. He also testified to other facts covered by the above correspondence.

S. A. McNeal corroborated the preceding witnesses as to the currency of the Kimball money and as to the insolvency of Brown, Smith & Company.

The jury found for the defendant. The plaintiffs moved for a new trial upon the following grounds, to-wit:

1st. Because the verdict was contrary to the law and the evidence.

2d. Because the court erred in charging the jury as follows: "In the ordinary course of business between merchants and their correspondents, it is understood to be the duty of the one party receiving a letter from the other, to answer the same within a reasonable time, and if he does not, it is presumed that he admits the propriety of the acts of his correspondent, and confirms and adopts them. If the principal, having received information by letter from his agent giving him the facts as to his acts, does not, within a reasonable time, express his dissent to the agent, he is deemed to approve his acts, and his silence amounts to a ratification, especially if such silence is calculated to mislead the agent. Ratification arises by implication as well as by the acts of the party. It is not absolutely necessary that there should be any positive or direct confirmation; and for this purpose the acts and conduct of the principal are construed liberally in favor of the agent. Slight circumstances and small matters will sometimes raise the presumption of ratification."

The motion was overruled, and plaintiffs excepted.

JAMES T. FLEWELLEN; H. & I. L. FIELDER, for plaintiffs in error.

A. HOOD, for defendant.

McCAY, Judge.

If an agent, acting in good faith, disobey the instructions of his principal, and promptly informs the principal of what

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he has done, it is the duty of the principal, at the earliest opportunity, to repudiate the act if he disapprove. Silence in such a case is a ratification: See the case of *McLendon vs. Wilson & Cullaway*, 52 *Georgia*, 41, from Troup county. Taking this correspondence altogether, we think the jury had a right to find that the plaintiffs were satisfied with the act of Gunn in taking the money in the Kimball funds, and that his dissatisfaction is an after-thought in consequence of the failure of Kimball. The evidence is convincing that if they had promptly notified Gunn of their dissatisfaction, he could have saved himself. Both the parties here were commercial men, and the rule is a fair and reasonable one that it is the duty of the principal promptly to answer the letters of his agent, and if he do not do so he is presumed to acquiesce in what the agent informs him he has done or proposes to do.

Judgment affirmed.

SIDNEY C. SHIVERS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. Upon the trial of a tax collector for embezzlement, transcripts from the books of the comptroller general and treasurer of the state, certified under section 3816 of the Code, are admissible in evidence to show a failure on the part of such defendant to pay over the taxes collected by him.
2. A motion for a continuance based on the ground that the indictment had been found only two days before the case was called for trial, and that the defendant's counsel had been constantly engaged in the business of the court to the exclusion of any opportunity of preparing the case, or even of consulting with his client, was properly overruled, it appearing that the defendant had been arrested under a warrant at the previous term of the court, and was then as fully informed of the nature of the accusation, as he was after the indictment was found.

Criminal law. Embezzlement. Evidence. Continuance. Before Judge POTTLE. Hancock Superior Court. April Term, 1874.

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Shivers was indicted for the offense of embezzling \$11,000 00, collected by him as tax collector for the county of Hancock, during the year 1871. He pleaded not guilty. When the case was called for trial, he moved for a continuance on the ground that the indictment had been found only two days previous thereto, and his counsel had been constantly engaged in the business of the court to the exclusion of any opportunity of making preparation in the case, or even of consulting with his client. The motion was overruled and defendant excepted.

It was shown by the prosecution that the defendant was the tax collector of Hancock county; that the state tax, assessed for the year 1871, on the taxable property of said county, was \$11,000 00; that the defendant had collected various amounts from divers tax-payers during that year; that when the solicitor general, as agent for the comptroller general and treasurer of the state, demanded the \$11,000 00 from him, he replied that he had collected and used the money and did not then have a dollar, but that "if they would give him a chance he would make it and pay it."

The solicitor general tendered in evidence the following papers:

"Hancock county, S. C. Shivers, Tax Collector :

"To general and poll tax, 1871.....	\$12,076 77
"1873. January 8th, by general tax paid treasurer.....	284 05
" " poll " " " 	513 00

“OFFICE OF THE COMPTROLLER GENERAL
“OF THE STATE OF GEORGIA,
“ATLANTA, GA., January 24, 1874.

"I, W. L. Goldsmith, comptroller general of the state of Georgia, do hereby certify that the above and foregoing account of S. C. Shivers, tax collector of the county of Hancock, in said state, for the year 1871, is a full, true and complete exemplification taken from the books on file in this office, and there required to be kept by law, in which the accounts with said state, of all the tax collectors thereof, are kept and record-

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ed according to law; that said account is truly and correctly taken and copied from said books; that the same is a full, true and complete exemplification of all the accounts of said S. C. Shivers, with said state, as such tax collector, from the year 1871, up to the present date, as copied and taken from said books; that the balance of \$11,279 72 due thereon, is unpaid, and that the amounts credited thereon, January 8th, 1873, were paid by L. L. Lamar, tax collector of said county.

"Given under my hand, official signature and seal of office, 24th day of January, 1874.

(Signed)

"W. L. GOLDSMITH,
"Comptroller General."

Also, certificate from the treasurer, in similar form to transcript from his books covering all payments into the treasury during the month of December, 1871, from whatever source, among which none appeared as having been made by the defendant.

This evidence was objected to, but was admitted by the court, and defendant excepted.

The jury found the defendant guilty. A motion was made for a new trial upon each of the above grounds of exception. The motion was overruled, and defendant excepted.

As to the refusal of the continuance, the presiding judge certified as follows:

"When this case was called it was postponed for a day to give defendant's counsel time. The defendant was arrested the term before and brought before me under a warrant. When asked by the court if he wanted counsel, he said 'no.' If he wanted a trial, he said 'no.' He was fully informed then of the nature of the accusation, as much so as he was after the bill was found."

GEORGE F. PIERCE; M. W. LEWIS; F. L. LITTLE, for plaintiff in error.

SAMUEL LUMPKIN, solicitor general, for the state.

WARNER, Chief Justice.

The defendant was indicted for the offense of embezzlement and on the trial thereof was found guilty by the jury. A motion was made for a new trial, on the several grounds alleged therein, which was overruled by the court, and the defendant excepted. Two grounds of error only have been insisted on here: First, the refusal of the court to grant the defendant a continuance on the showing made therefor; and second, in admitting in evidence the certified copies of the record books of the state treasurer and comptroller general, the defendant insisting that he was entitled to be confronted with the witnesses testifying against him, and that, in allowing the certified copies of the records kept by those officers to be read in evidence, the defendant was deprived of a constitutional right. By the law of this state, the certificate of any public officer thereof, of any record, document, paper on file, or other matter or thing in their respective offices, or appertaining thereto, is admissible in evidence in any court of this state: Code, section 3816. The mistake of the plaintiff in error in this case consists in the assumption that the certificates of the treasurer and comptroller general as to what appears on the records of their respective offices is the personal testimony of those officers, whereas, they only certify what appears on the records of their office. They were not personally examined as witnesses against the defendant. If they had been offered as witnesses against the defendant at the trial, they would necessarily have been required to testify in open court; their testimony could not have been taken by interrogatories. From the explanatory note of the presiding judge, and in view of the facts contained in the showing for a continuance, the defendant had reasonable time and opportunity to have prepared his defense. As a general rule, the court before which the case is tried will be allowed a liberal discretion as to the continuance of cases, and this court will not interfere with it, unless it has been manifestly abused and injustice done.

Let the judgment of the court below be affirmed.

Brown vs. The Eagle and Phenix Manufacturing Company.

J. RHODES BROWN, plaintiff in error, vs. THE EAGLE AND PHENIX MANUFACTURING COMPANY, defendant in error.

When the verdict of the jury is for one-fourth more than is justified by the pleadings and evidence, and the court below granted a new trial, this court will not reverse the judgment, nor will it put the defendant in error on terms so as to require him to write off the excess when the evidence is conflicting as to his right to recover at all. The judge having granted a new trial, his judgment ought not to be disturbed.

New trial. Practice in the Supreme Court. Before Judge JAMES JOHNSON. Muscogee Superior Court. October Term, 1873.

J. Rhodes Brown brought assumpsit against the Eagle and Phenix Manufacturing Company for \$21,000 00. He alleged that on May 4th, 1866, plaintiff, at the request of defendant, planned, prepared and organized the erection of the factory of the defendant, and superintended for and during two years and one month from the day last aforesaid, the mounting, putting in operation the machinery, and the manufactures fabricated and sold by it, for which services the defendant undertook and promised to pay him the amount aforesaid. The declaration also contained *quantum meruit* and *quantum valebat* counts. It was filed May 1st, 1872.

The defendant pleaded the statute of limitations, the general issue, payment, and accord and satisfaction.

The jury found for the plaintiff \$4,930 00, with interest from June 2d, 1868. The defendant moved for a new trial, because the verdict was contrary to the law and the evidence.

The evidence was voluminous and conflicting. It is omitted as unnecessary to an understanding of the opinion. The calculation upon which the jury reached their verdict was as follows:

Estimate of salary for two and a half years.....	\$15,000 00
Profits in water lots..... ..	2,630 00
Dividends in old factory..... ..	1,500 00
	<hr/>
	\$19,130 00

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Amount brought forward.....	\$19,130 00
Payments.—Subscription to stock.....	\$12,500 00
Cash.....	1,100 00
Account.....	600 00
	<hr/>
	\$14,200 00
Deduct	\$14,200 00
Amount of verdict.....	<hr/>
	\$ 4,930 00

In this calculation there is a manifest error against the defendant in this, that it is charged with "profits in water lots, \$2,630 00," and "dividends in old factory, \$1,500 00," which the evidence failed to disclose ever went into its treasury. In fact, the amount of these items was in the hands of William H. Young, one of the directors of defendant. Out of it he paid to the defendant the sum of \$3,125 00, the amount of plaintiff's first installment of his subscription to stock, having in his hands \$1,005 00, which was improperly charged by the verdict to the defendant. These two items arose from other business transactions between Young and the plaintiff, and never went upon the books of the defendant.

The court ordered a new trial, and plaintiff excepted.

R. J. MOSES; M. H. BLANDFORD, for plaintiff in error.

INGRAM & CRAWFORD; PEABODY & BRANNON, for defendant.

McCAY, Judge.

The verdict in this case is shockingly large, and as to the item for the interest of the plaintiff in the old property, etc., it is *clearly* wrong. The defendants below were, under the evidence, in no way answerable for that, and there is hardly any view of the evidence that will justify the amount of this verdict that does not include this item in the finding. We have been appealed to, to direct this item to be written off and to let the verdict stand in this condition. But we decline to do so. We agree with the judge that the verdict is a hasty one, evidently made up under a leaning by the jury in favor

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of the plaintiff in the case, and as the judge has granted a new trial, we think it in accord with the principles of justice that there should be a new trial. The large demand made by the plaintiff and the extravagant estimate by some of his witnesses of the value of his services, look to us as fabulous and oppressive, and we think the defendant in error entitled at least to the verdict of another jury.

Judgment affirmed.

WILLIAM R. BROWN, plaintiff in error, vs. JAMES A. SPIVEY, trustee, defendant in error.

1. A *bona fide* creditor, to avail himself of the failure to record a voluntary settlement of the husband upon the wife in the county of the residence of the husband, within three months after its execution, must have become such before the actual record of the same, on the faith of the property embraced in the settlement.
2. A voluntary conveyance made by a husband, solvent at the time, to his wife and children, is binding as against creditors.

Husband and wife. Registry. Marriage settlement. Fraudulent conveyance. Debtor and creditor. Before Judge HILL. Houston Superior Court. May Term, 1874.

For the facts of this case, see decision.

POE, HALL & LOFTON, for plaintiff in error.

S. D. KILLEN, for defendant.

WARNER, Chief Justice.

This was a claim case, on the trial of which, the following facts are disclosed in the record:

In 1859, Henry Brown, the father and testator of plaintiff, sold to James A. Spivey, half of lot of land number fifty-five, fifteenth district, Macon county, for \$900 00. Defendant paid plaintiff, as executor of Henry Brown, all of this amount

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except the sum of \$258 37, for which sum he gave plaintiff his note, 26th December, 1867, due at one day. On this note, plaintiff instituted suit on the 31st of December, 1869, returnable to the next term of Houston superior court, and judgment was rendered in this suit on the 12th day of December, 1870, and execution issued thereon 23d December, 1870; this execution was levied on the land in question, 3d October, 1871. On the 2d of October, 1868, Spivey, then a resident of Macon county, exchanged with Dennard, one thousand six hundred and fifty acres of land in Macon county for two places in Houston county, the one levied on, and another called Oaktucky; the place levied on containing between five and six hundred acres of land was rated in the exchange at \$10,000 00, and for that consideration, Dennard, by Spivey's direction, conveyed the same to Spivey to hold in trust for his wife and children. This deed bore date on the day and year aforesaid, and was attested by Samuel D. Killen, and T. M. Killen, deputy clerk of the superior court of Houston county. There was nothing else that purported to be an official attestation, and there was no proof of the execution of the deed; thus attested it was recorded by the clerk of the superior court of Houston county on 29th December, 1869; it was never recorded at all in Macon county, the residence of Spivey (the husband,) at the time of the settlement. It was shown at the time of this transaction, that Spivey was indebted between \$4,000 00 and \$6,000 00; that he retained property over and above the voluntary settlement at the estimate he and others placed upon it—worth between \$12,000 00 and \$15,000 00—that most of this property had been disposed of by him; that he resided with his wife and children on the place embraced in the settlement, and controlled it, and had done so since his removal to the place. He also testified when on the stand, that in making this voluntary settlement upon his family, he had no intention or design of delaying, hindering or defrauding his creditors, to which testimony plaintiffs objected, upon the ground that this was an inference which the jury, and not the witness,

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might draw from the facts and circumstances given in the evidence, which objection was overruled and plaintiff excepted.

Plaintiff also requested the court, in writing, to charge the following, which the court refused, viz.: "That if the jury believed, from the testimony, that Spivey procured the deed from Dennard to him as trustee for his wife and children, and paid him the consideration therefor, then this was a voluntary settlement by Spivey on his wife and children, and the deed should have been recorded in the county of Spivey's residence within three months from the time it was made, and upon failure to make such record of the said deed within the time prescribed and as above set forth, the same would not be of any force or effect against a creditor who, *bona fide* and without notice, may have become such before the actual recording thereof.

"That the failure to record such deed within the time prescribed by law was, in legal contemplation, a concealment of the same and a badge of fraud, especially if it appears from the evidence that the defendant was in possession of and controlling the land levied upon. That any violation of the policy which the law prescribes, and which might work injury to the rights of a third person, was legal, though not actual, fraud.

"That if defendant had applied to the courts to set apart a homestead and exemption for his family, and this land had been so set apart, it would not have prevailed against this debt, if they believed that the debt was in existence prior to the passage of the law authorizing the laying out and setting apart of a homestead; and what the defendant could not do with, he could not do without, the sanction of the courts.

"That if the jury should believe that the execution levied, was for the purchase money of a piece of land which Spivey exchanged for the land settled on his family, and that Spivey bought the land exchanged from Brown's father and testator, then the land settled should be held subject to the extent to

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which that purchased from Brown's testator entered into the exchange.

"That while the mere fact that a man was indebted at the time of making a gift would not render the gift void, yet if it be founded merely upon a good consideration, such as blood or affection, it may be set aside, if it appears that the party making it was in embarrassed circumstances when it was made, for a man must be just before he is generous, and is bound, both legally and morally, to pay his debts before giving away his property."

The court then charged, "that if Spivey was not insolvent at the time of making the conveyance—that is, if he was not unable to pay his debts, then he had not only a right to make such gift, *but it was his duty to make provision for his family*, and the transaction would be good and valid against this claim. That the fact that the land purchased of Brown's father and testator was a part of the consideration for the exchange of the land settled, did not strengthen the plaintiff's equity."

To which charge as given, and refusal to charge as requested, the plaintiff excepted.

The court also charged the jury, at the request of plaintiff, "that although the defendant in execution may have disavowed any fraudulent intent in the procurement of the deed, yet this is a conclusion to which the jury should not assent, if all the facts and circumstances given in evidence go to show the contrary." The jury found the property not subject.

1. The note on which the judgment was obtained was given by the defendant, on the 26th of December, 1867, and due one day after date. The deed executed by Dennard, conveying the land levied on to the defendant in trust for his wife and children, was executed on the 2d October, 1868, but was not recorded in the county of Macon, where the defendant resided at the time the settlement upon his wife and children was made. It is insisted for the plaintiff here, that he is such a creditor as is contemplated by the 1778th section of the Code, and that the settlement made by the defendant on the

2d of October, 1868, upon his wife and children, has no force or effect as against him as such a creditor. That section of the Code, (which substantially embodies the provisions of the act of 1847, as interpreted by this court,) declares that "every marriage contract, and every voluntary settlement made by the husband on the wife, whether in execution of marriage articles, or not, must be recorded in the office of the clerk of the superior court of the county of the residence of the husband, within three months after the execution thereof. On failure to comply with this provision, such contract or settlement, shall not be of any force or effect against a purchaser, or creditor, or surety, who *bona fide*, and without notice, may become such before the actual recording of the same. Who is a *bona fide* creditor within the true intent and meaning of the statute? A *bona fide* creditor is one who gives credit to the husband on the faith of the property contained in the marriage settlement: *Cloud & Schackleford vs. Dupree*, 28 *Georgia Reports*, 173; *Cunningham et al. vs Schley et al.*, 41 *Georgia Reports*, 435. The creditor of the husband must become such on the faith of the property contained in the settlement before the actual recording of the same. The contract in this case was made by the creditor with the defendant, several months before the execution of the settlement. But it is said, although this may have been so, still, the creditor indulged the defendant, extended his credit on the note upon the faith of the property embraced in the settlement. There is no more evidence in the record that the defendant's credit was extended on the faith of that property, than there is that the debt was originally contracted on the faith of that particular property. For aught that appears in the record, the credit was given to the defendant upon the faith of his other property, as that it was given on the faith of the property contained in the deed of settlement. In our judgment, the plaintiff in this case, was not such a *bona fide* creditor of the defendant as is contemplated by the section of the Code before cited.

2. The next question to be considered is, whether the vol-

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untary conveyance was void as against creditors, under the 1952d section of the Code, which declares that every voluntary deed or conveyance, not for a valuable consideration, made by a debtor insolvent at the time of such conveyance, shall be fraudulent in law against creditors, and as to them null and void. The weight of the evidence in the record is, we think, in favor of the solvency of the defendant at the time of the execution of the voluntary deed of settlement upon his wife and children—at any rate, that was a question for the jury under the charge of the court, and there was no motion for a new trial on the ground that the verdict was contrary to the evidence. The court, in its charge to the jury, stated the law applicable to this branch of the case, substantially correctly, though it would have been a better *legal* charge if the court had omitted to have said anything about the *moral* duty of the defendant to make provision for his family. In view of the facts disclosed in the record of this case we find no material error in the refusal of the court to charge as requested, or in the charge as given to the jury.

Let the judgment of the court below be affirmed.

DANIEL ADAMS, plaintiff in error, vs. THOMAS J. CARTER, defendant in error.

Where a father and son, both living on the place, *farm together* under an agreement that the father is to furnish the land and the stock and provisions for the stock, and the son to furnish the hands and to superintend the work, and the crop to be equally divided between them, and nothing more appears, they are, as to third persons, partners in the enterprise.

Partnership. Before Judge HILL. Houston Superior Court. May Term, 1874.

Carter brought complaint against R. R. & Daniel Adams for \$199 38, besides interest. The defendant, Daniel Adams, pleaded the general issue and no partnership.

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Upon the question of partnership the evidence presented the following case: R. R. Adams was the son of Daniel Adams. They both lived on the farm of Daniel, and cultivated it under an agreement that the latter should furnish the land, stock and the provisions for the stock, whilst R. R. Adams furnished and paid the labor and superintended the same, the crop to be equally divided.

The court charged the jury that there being no question as to the correctness of the account as against R. R. Adams, that if the jury believed the facts to be as above stated, a partnership existed between the defendants, and they should find for the plaintiff. A verdict was rendered accordingly.

A motion was made for a new trial in behalf of Daniel Adams, on account of error in the charge aforesaid. The motion was overruled, and said defendant excepted.

H. M. HOLTZWILAW ; S. D. KILLEN, for plaintiff in error.

DUNCAN & MILLER, for defendant.

McCAY, Judge.

The evidence shows that these parties *farmed together*, and that they were jointly interested in the profits and losses of the crop. This comes within the very letter of the definition of a partnership, as contained in the Code, section 1890. There is nothing in the evidence contained in the record to qualify this relation, nothing going to show that one was the servant of the other, or that one was the landlord and the other a cropper. They farmed together; both seemed to have had equal control and a joint ownership. Under the peculiar circumstances of the country growing out of the relation of the late slaves to their employers, we have construed these contracts not to be partnerships, when there was anything indicating such was not the intent. But there is nothing here at all qualifying the ordinary meaning of the contract, and we think the judge was right.

Judgment affirmed.

Wannack vs. The Mayor and Council of Macon.

AUGUSTUS WANNACK, plaintiff in error, vs. THE MAYOR AND COUNCIL OF THE CITY OF MACON, defendant in error.

1. The place of the execution of the commission attached to interrogatories must appear, otherwise such evidence should be excluded.
2. Where the facts stated in the affidavit of a witness in support of a motion for a new trial in behalf of the defendant, on the ground of newly discovered evidence, are controverted by the plaintiff, who submitted divers affidavits to the court, which he claimed showed the statement of such witness to be entirely unworthy of credit, but which did not attack such witness upon the ground of general bad character, this court will not control the discretion of the court below in ordering a new trial.
3. It was error in the court to remark, in its charge to the jury, that certain evidence which had been introduced upon the trial was of but little value, and to give its reasons therefor.
4. It is improper for the court, in the presence of the jury, to ask counsel if they will consent for the jury to disperse after having agreed upon their verdict, but before having returned it into court.

Interrogatories. New trial. Charge of court. Evidence. Jury. Practice in the Superior Court. Before Judge HILL. Bibb Superior Court. October Adjourned Term, 1873.

For the facts of this case, see the decision.

LANIER & ANDERSON, for plaintiff in error.

R. W. & S. H. JEMISON; HILL & HARRIS, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant to recover damages for the loss of his stock of goods and merchandise in the city of Macon, destroyed by fire in consequence of the negligent conduct of its officers and agents in allowing and permitting divers persons to congregate together in the streets of said city, and to discharge fire-arms, Roman candles, and other combustible materials in the streets of said city, in violation of its charter and ordinances. On the trial of the case, the jury found a verdict for the plaintiff

for the sum of \$1,925 19. The defendant made a motion for a new trial on the several grounds stated therein, which was granted by the court on the third and tenth grounds contained in the motion; whereupon, the plaintiff excepted.

1. The tenth ground of error alleged in the motion, was the overruling the defendant's written exceptions to the execution and return of the commission for the interrogatories of two material witnesses for the plaintiff, Wannack, and Martin. The interrogatories served on the defendant recited that the witnesses resided in the city and state of New York. The commission purports, on its face, to have been executed in Georgia, Bibb county, on the 28th of June, 1873, and at that time there were no such persons as Peter Meyer and John S. Ray, who pretended to have executed the commission, to be found in Bibb county, Georgia, and the person who pretends to have received the same from Ray, one of the pretended commissioners, and signing his name F. L. James, P. M., fails to state of what office he was postmaster, and further, there was no such postmaster in Bibb county, Georgia, on the 28th of June, 1873. It was conceded on the argument here that the interrogatories were, in fact, executed in the city of New York, and that "Georgia, Bibb county," was inserted as the place of execution by mistake; but it was insisted that, inasmuch as it was merely a mistake in inserting "Georgia, Bibb county," as the place of execution, the defendant was not hurt by that mistake, especially as no commissioners were named. The reply is, that the statute law of the state requires that the *place* of the execution of the interrogatories by the commissioners should appear: Code, section 3888. When the statute declares that the place of the execution of interrogatories should appear, we understand it to mean the place where the same were, in fact, actually executed. With the policy of this requirement of the statute the courts have nothing to do, but it is their duty to obey it. If necessary, several good reasons could be given in support of its requirement. The question for the courts to decide is, what does the statute require in regard to the place of the execu-

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tion of interrogatories, not whether a *mistake* as to the place of the execution thereof will hurt the objecting party. Such a construction of the statute would make it a very *flexible* rule prescribed by the supreme power in the state for the execution of interrogatories by commission, but would be most inconvenient and uncertain in its practical administration. The court did not err in sustaining the motion for a new trial upon this ground, as set forth in the record.

2. The third ground contained in the motion, on which the court granted the new trial, was the discovery of new and material facts by the defendant, since the rendition of the verdict. That the newly discovered evidence is material and not merely cumulative, and was not discovered by the want of proper diligence on the part of the defendant, was not seriously denied, but the plaintiff insists that the facts and circumstances which he proved by the counter-affidavits of divers persons, and exhibited to the court, were such as to render the statement of Willis, in his affidavit, the witness by whom the defendant expected to prove the newly discovered facts, entirely unworthy of belief, and that the court ought not to have given any credit to the same in considering the motion for a new trial on this ground of the motion. It will be noted, that the affidavits offered by the plaintiff, did not attack the credibility of Willis, on the ground of his general bad character. Whether the facts detailed in the affidavits offered by the plaintiff, were such as to render the statement of Willis, in his affidavit, unworthy of credit, was a question exclusively for the consideration and judgment of the court on the hearing of this motion, and as the court, in the exercise of its judgment, thought proper to give credit to his statement, so far as to submit the same to the consideration of the jury on a new trial, this court, will not interfere to control its judgment upon the facts presented, in that respect.

3. It was insisted on the argument for the defendant, that the court should have granted the new trial on other grounds contained in the motion therefor, as well as those on which it was granted, especially on the ground, that the court erred in

its charge to the jury in using the following words: "Why, gentlemen of the jury, I saw that Christmas exhibition myself, and was alarmed," and added, "but I am not a witness in this case, and was not at the firing, and I know nothing about how the fire occurred on Cherry street, and you must be governed by the evidence in regard thereto, and about which, I neither express or intimate my opinion." That the court also erred in saying to the jury, "the proof that plaintiff gave in for taxes in the early part of the year, property of less value than the amount sworn to by the plaintiff as lost by him, is of but little value, for he may have bought more goods after he made his return, and so of his insurance policy, he may have insured for less than the whole of his property. Men are not bound to insure for anything, indeed, insurance companies usually require insurers to take part of their own risk." The remarks of the court to the jury, and expression of opinion that any part of the evidence, was of but little value, and its reasons therefor, was erroneous and improper. Whether we should have granted the new trial on these grounds alone, in this case, it is not necessary for us now to decide, but we advert to them for the purpose of expressing our strong and emphatic condemnation of the action of the court, as disclosed in the record before us, as this court has heretofore done on former occasions of similar conduct on the part of the courts below on the trial of cases. The court on the trial of a cause before it, is presumed to be, and should be, an impartial arbiter as to the legal rights of the parties, and if competent evidence is submitted to the jury, it is their exclusive province to consider that evidence, without any expression of opinion by the court as to whether it is of much or of but little value.

4. The following request made by the court of the counsel, in the presence and hearing of the jury, as a matter of practice, was improper: "Will you consent for this jury, after having made up their verdict, to disperse and to return into court to-morrow morning a sealed verdict, sooner than they shall stay together all night?" This demand of counsel for

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their consent should not have been made until after the jury had retired, and if the consent had been obtained, then to have so instructed the jury, or if made before the jury retired, it should have been done privately, so that the counsel would have been free to consent, or dissent, without prejudice to their case then in the hands of the jury.

Another ground was urged by the defendant why a new trial should have been granted was, that the defendant was not liable at all to the plaintiff for the damages sued for. As we affirm the judgment of the court below in granting the new trial on the grounds specified therein, we express no opinion as to the liability of the defendant under the special facts of this case.

Let the judgment of the court below granting the new trial be affirmed.

EDWIN P. WILLIAMS, plaintiff in error, vs. CHARLES J. JENKINS, governor, defendant in error.

An entry by the solicitor general upon the original *sci. fa.* upon a forfeited recognizance, that he had "received \$5 00 as his cost, the defendant having appeared in court," is no discharge of the bond, nor any suspension of the proceedings to take final judgment on the same.

Criminal law. Bail. Bond. Before Judge KNIGHT. Towns Superior Court. November Term, 1873.

George W. Caradine entered into two recognizances with Edwin P. Williams as security, for his appearance at the superior court of Towns county to answer to two indictments, each for the offense of assault and battery. He failed to appear, and the bonds were forfeited. Executions issued and were levied upon the property of the security. He moved to vacate the judgments upon the ground that a compromise was pending between him and the solicitor general at the time the rules absolute were entered. In support of this motion, coun-

sel for Williams relied upon the following entry, which appeared upon each *scire facias* :

"Received my cost, \$5 00, on this *scire facias*, the defendant having appeared in court. October term, 1868.

(Signed) "S. C. JOHNSON, solicitor general."

The motion was overruled, and Williams excepted.

WIER BOYD, for plaintiff in error.

C. D. PHILLIPS, solicitor general, for the defendant.

McCAY, Judge.

We see no good reason why this judgment should not be affirmed. The entry of the solicitor general that the costs were paid, "the defendant having appeared in court," is no discharge of the bond or satisfaction of the estreatment. The condition is not only that he shall appear but that he shall not depart without leave of the court. There can be no discharge of the forfeited recognizance, but by the surrender of the defendant into the custody of the court or its officers. The highest evidence of this is an entry on the minutes. There is no evidence here at all of a surrender into *custody*. Being in court is one thing, being in custody another. Nor is the solicitor general the judge of such surrender. His entry cannot charge the sheriff, even did his entry go so far as to declare him in custody, and this it does not do. We doubt not that there was no surrender. There was probably a talk of a settlement, but it was not effected. To permit so loose a discharge of bonds as this would be bad public policy, and we cannot say it was error in the judge to refuse to sanction it. The authority of the attorney to acknowledge service was admitted on the argument, and any point upon it was waived.

Judgment affirmed.

Curtin & Tumlin vs. Munford & Gilreath.

CURTIN & TUMLIN, plaintiffs in error, *vs.* MUNFORD & GILREATH, defendants in error.

1. Defendants entered into a written contract with plaintiffs by which they agreed to pay for six tons of iron ore per day, at \$3 00 per ton, for a period of twelve months. Before the expiration of the twelve months, one of the defendants procured the appointment of a receiver to take charge of the business of his firm, "and to manage it so as to make the most he can out of the same." During the period that the receiver was in charge of the property, plaintiffs continued furnishing ore. There was evidence to show that the business was managed in the interest and for the benefit of the defendant who secured the appointment of the receiver:

Held, that in a suit against the firm for the price of such ore, the defendant was liable.

2. Where evidence was not objected to upon the trial, its admission is no ground of error.

3. The verdict is supported by the testimony.

Receivers. Contracts. New trial. Practice in the Supreme Court. Before Judge McCUTCHEN. Bartow Superior Court. March Term, 1873.

For the facts of this case, see the decision.

WOFFORD & MILNER; GEORGE N. LESTER, for plaintiffs in error.

J. A. W. JOHNSON, for defendants.

WARNER, Chief Justice.

This was an action brought by the plaintiffs against the defendants on an open account for the sum of \$873 85, with a bill of particulars annexed. On the trial of the case, the jury found a verdict in favor of the plaintiffs for \$466 28. A motion was made for a new trial on the following grounds: 1st. "Because the verdict is strongly and decidedly against the weight of the evidence." 2d. "Because the court erred in permitting L. S. Munford to testify that he made his entries in his book from slips of paper furnished the drivers who hauled the iron ore." 3d. "Because the items sued on in

plaintiffs' account were created, if at all, by Cox, as receiver, and after the whole business of Curtin & Tumlin had been taken charge of by the court under a bill in equity, and that defendant, Tumlin, is not liable for said account so made after the business was in the hands of the court."

1. It appears from the evidence in the record that James Curtin and Tumlin were partners in running an iron furnace in Bartow county, under the firm name of Curtin & Tumlin. It also appears, from the evidence in the record, that on the 1st day of November, 1870, Curtin & Tumlin made a written contract with the plaintiffs, by which they agreed to furnish the defendants on an average of six tons of iron ore per day for the term of twelve months from the date of the agreement, for which the defendants were to pay the plaintiffs \$3 00 per ton, monthly, or at the end of each month. The plaintiffs' account is for the balance due them for iron ore delivered in pursuance of that agreement. The record shows that an extract from the minutes of Bartow superior court was read in evidence, from which it appears that on the 3d day of December, 1870, an order was granted in an equity case, in which Tumlin was complainant, and James Curtin and Austin Curtin were defendants, (the bill not being in the record,) appointing a receiver to take charge of and manage the property of said partnership, and manage it so as to make the most he can out of the same and pay the debts due by the partnership, paying first those debts due to others than the parties to this bill; that the receiver make no new debts to bind the partnership in any way, and that he keep an account of his receipts, expenses, disbursements, payment of debts, etc., and make return of his actings and doings at the next term of the court. The record shows, that another extract from the minutes of the court was offered in evidence, from which it appears that a second order was made in the equity case between the same parties on the 17th day of December, 1870, in which it is recited that the receiver appointed by the first order had failed to give bond and security as required therein, and that John Cox had been suggested by the complainant, Tumlin, as a

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proper person for receiver. It was ordered by the court that said Cox be appointed receiver of the partnership effects of Curtin & Tumlin, upon the same terms and conditions as expressed in the former order. The evidence in the record, that the iron ore was delivered by the plaintiffs to the furnace of the defendants, in pursuance of the agreement made on the 1st of November, 1870, is quite clear; that agreement, was made before any receiver was appointed, and the question is, whether the partners are bound to pay for it. There is no evidence in the record of a dissolution of the partnership of Curtin & Tumlin, by the decree of the court, or otherwise, except that Curtin has left the country. Cox, it appears, was appointed receiver at the instance of Tumlin, and, according to his evidence and Munford's, the furnace was run afterwards, when the plaintiff's ore was received and used, for the benefit of Tumlin. It is true that Tumlin denies it, and he is corroborated by Lyon, but the evidence in relation to that point in the case is conflicting. If the iron ore was delivered by the plaintiffs under the agreement made with Curtin & Tumlin, before the receiver was appointed, and was used for the benefit of Tumlin, after the receiver was appointed, then he ought to pay for it, and that was the question for the jury to decide under the evidence before them. Whether the receiver, after his appointment, received and used the iron ore delivered by the plaintiffs under the agreement of the 1st of November, 1870, under the order and direction of the court, or whether he received and used it under the direction and for the benefit of Tumlin, was a question of fact under the evidence in the record. There is no complaint as to the charge of the court to the jury, and the presumption therefore, is, that the court charged the law applicable to the facts of the case correctly.

2. If the evidence of Munford as to the manner in which the entries were made on his books, was objectionable, which is not at all apparent to us, from his testimony, still, it does not appear in the record, or in the motion for a new trial, that the admission of the evidence was objected to at the time of the trial.

3. Assuming that the jury, under the evidence, believed that the furnace was run by Cox for the benefit of Tumlin, and that the plaintiffs' ore was received and used for his benefit, then the verdict is quite moderate as to the amount found by them. The real object of the motion for a new trial was to have the verdict of the jury set aside on the ground that it was against the evidence. The other grounds taken in the motion are merely *colorable* to get rid of the verdict. The presiding judge, in the exercise of the sound discretion vested in him by law, refused to grant the new trial, and we are called on to control the exercise of that discretion. Upon what principle shall we control it? Shall we control it because he erred in not holding that the jury should have believed the witnesses for the defendants instead of the witnesses for the plaintiffs? What legal power or authority have courts to compel juries to believe the witnesses sworn on one side in preference to those sworn on the other? If the court before which the case was tried, which saw and heard the examination of the witnesses, has no such legal power or authority, much less has this court any such legal power or authority. It was never intended, when this court was organized, that it should be a tribunal to determine questions of fact, or to judge of the credibility of witnesses. One of the prominent objections of the people of this state to the establishment of a supreme court for the correction of errors was, that it would deprive them of the right of having questions of fact tried by a jury of the vicinage, as they had theretofore been accustomed. The reply was, that the supreme court was to be established for the correction of errors of *law*, and not to decide questions of *fact*, and such has been the general ruling of this court from its first organization up to the present time. Notwithstanding this general ruling of the court, fully one-third of its time is occupied in the argument of cases upon the facts, as if we were a jury to decide upon the facts and judge of the credibility of the testimony of witnesses. If parties and their counsel would observe this general ruling of the court in relation to motions for new trials on the ground that the verdict

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of the jury is contrary to the evidence and the weight of the evidence, instead of coming here for the purpose of *experimenting* upon this court in the hope of obtaining a new trial, when no rule of law has been violated, it would save a great deal of time and unnecessary trouble. We all know, from observation and experience, that as a general rule no one is ever satisfied when the judgment of a court, or the verdict of a jury, is rendered against him, and this court has no power to compel parties to be *satisfied*, but it has the power to compel parties to *acquiesce* when a lawful verdict and judgment has been rendered against them, and when that has been done, it is for the interest and welfare of the commonwealth that there should be an end of litigation, so far as that particular case is concerned.

Let the judgment of the court below be affirmed.

GREEN J. BLAKE *et al.*, plaintiffs in error, vs. THE MAYOR AND COUNCIL OF THE CITY OF MACON *et al.*, defendants in error.

1. An act of the legislature authorizing a municipal corporation to subscribe for stock in railroads and to issue bonds to pay for the same, does not authorize it to contribute to a railroad by indorsing its bonds, and upon the complaint of a tax-payer or citizen of the corporation, a court of equity will enjoin such indorsement.
2. Neither the act of 1871, amending the charter of the city of Macon, nor the act of 1874, regulating the *manner in which* municipal corporations shall issue bonds, authorizes the issue of any bonds which said city or said corporations have not a special legislative authority to issue, independently of such acts.
3. The indorsement of the bonds of a street railroad in a city by the city authorities, is not within the ordinary administrative powers of the corporation, and requires a special legislative grant.

Municipal corporations. Railroads. Bonds. Indorsement. Before Judge HILL. Bibb county. At Chambers. October 10th, 1874.

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Green J. Blake and others, residents and tax-payers of the city of Macon, filed their bill against the mayor and council of the city of Macon and the Macon Street Railroad Company, alleging that under an act of the general assembly, the said street railroad company proceeded to construct its road and has been running it for two years or more; that said company is a private corporation and in no way connected with the mayor and council of the city of Macon; that said city derives no pecuniary benefit from said street railroad, and are not stockholders in said company; that said company is greatly embarrassed, if not insolvent; that said company proposes to extend the lines of its road to other parts of the city, and to enable it to do so, and to meet its present indebtedness, it asks said city to indorse its bonds to the amount of \$20,000 00, and proposes to indemnify said city by mortgaging to it the entire property belonging to said street railroad; that said city agreed to said proposition, and ordered an election of its citizens, who ratified it by a two-thirds vote; that the indemnity offered will fall greatly short of the liability assumed, and the property of the citizens would be subject to taxation to meet the deficiency; that said indorsement is beyond the power of said mayor and council under the constitution and laws of this state; that no provision is made in any of the acts of the general assembly authorizing them to indorse said bonds, and that, by the 16th and 17th sections of an act of the general assembly of this state, approved 11th December, 1871, to grant additional powers to the mayor and council of the city of Macon, they are prohibited from indorsing said bonds, and by article 3, section 6, and paragraph 4, of the constitution of this state, it is not competent for the general assembly to permit the said mayor and council to indorse said bonds even with the vote of the citizens. Pray that the writ of injunction may issue.

The Macon Street Railroad Company answered substantially as follows :

Denies the right of complainants to the injunction prayed; denies that the defendant is wholly a private corporation, but

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public to the same extent as are other incorporated railroad companies ; says that the indebtedness of said defendant does not exceed \$10,500 00 ; that its property is worth \$15,000 00 ; that the tracks and additional tracks and all the property are to be mortgaged to the city ; that it will be full indemnity. Denies the charge that said road is insolvent, and that the indorsement will be for the benefit of the road only, and that the same will involve the city in loss and impose burdens on the tax-payers. Says that said city, through the mayor and council, solicited that the track running from the intersection of Third and Mulberry streets to the central city park, (about half a mile) should be constructed, and said city paid \$5,000 00 for that purpose ; that this park is known as the fair grounds on which the city has spent \$150,000 00 ; that it is of vital consequence to keep this street railroad in successful operation to and from said park, and it enhances the value of said grounds ; that the road brings the city commons and other property into easy access, and adds to the public convenience of a large portion of the citizens and tax-payers ; that the said mayor and council did, in accordance with the provisions of the charter and ordinances of said city and the constitution and laws of the state, agree to indorse said bonds to the amount of \$20,000 00, and submitted it to a vote of the citizens and tax-payers, as required by the charter, and that action was duly ratified.

The injunction was refused and the complainants excepted.

POE, HALL & LOFTON, for plaintiffs in error.

1st. It is a matter of indifference, for the purposes of this case, whether the Macon Street Railroad Company be a public or private corporation, since the construction of the powers of both kinds of corporations is the same ; but if it be material, then it is unquestionably, under our Code, a private corporation : See Charter, Acts 1868, page 107 ; Code, sections 1671, 1672, 1673.

2d. The question in this case is, whether the mayor and city council of Macon can, under their charter, become the guar-

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antor, accommodation indorser, or security, for undertakings of another corporation, Under sections 16 and 17 of amended charter of 1871, the mayor and council have power to issue bonds for specified purposes, and to "subscribe" for railroad stock, upon the ratification of their act by two-thirds of the citizens voting at an election held for the purpose: Acts 1871, page 121. Municipal corporations, like private corporations, must act within the powers expressly given, or such implied powers as are necessary to accomplish the object of their creation: 1 Dillon on Municipal Corporations, sections 29, 31, 55 and notes; Charles River Bridge *vs.* Warren Bridge, 11 Peters, 536; Mayor and Council of Savannah *vs.* Hartridge, 8 Ga., 23; Bethune *vs.* Hughes, 28 *Ibid.*, 564. The power to issue bonds or subscribe for stock does not include the power to make accommodation indorsements, or to enter into engagements of guaranty or suretyship, even for another corporation invested with powers for the accomplishment of the same or similar objects: 1 Dillon Municipal Corporations, section 393; 1 Parsons, N. & B., 166; Bank of Genesee *vs.* Patchin Bank, 3 Kern., 314; Louisiana State Bank *vs.* Orleans Navigation Company, 3 Louisiana R., 294; Clarke *vs.* Des Moines, 19 Iowa R., 199 and 204; Chamberlain *vs.* Burlington, *Ibid.*, 395; Smead *vs.* Railroad Company, 11 Indiana R., 105; Payne *vs.* Brecau, 3 Hurlston & Nor., 572; Bateman *vs.* Mid. Wales Railway Company, Law R., 1 C., page 510; 1 Dillon Municipal Corporations, section 81. In several cases the supreme court of the United States have held that the power to borrow money implies the power to issue securities for the repayment of the loan: Meyer *vs.* Muscatine, 1 Wallace, 384; Rogers *vs.* Burlington, 3 *Ibid.*, 654. These decisions, and others following them, have been modified and limited in extent by a later ruling of that court: City of Nashville *vs.* Ray, determined at October term, 1873, and reported in Law Times and Reports, June, 1874, page 348.

3d. Upon the principles we have been discussing, it is not competent for the general assembly of this state to grant permission to a municipal corporation to extend such accommo-

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dation as is here asked: Paragraph 4, section 6, article 3, constitution. Code, section 4067, defines and limits the power of the legislature in this respect. It may permit a corporate town or city to "take stock" or "make contribution" to, or "engage in" constructing "railroads or works of public improvement," "after a majority of the voters of such town or city, voting at an election held for the purpose, shall have voted in favor of the same, *but not otherwise.*" It is clear from paragraph 6, same article, and Code, section 5068, that the framers of the constitution did not intend to include the power to guaranty, indorse or become security, in the terms "take stock," "*make contribution,*" or "engage in." By this section the state cannot become "*a stockholder*" in any corporate company; but its credit may "*be granted*" "*or loaned*" "*to aid*" such company, upon certain specified conditions: Thorne *vs.* Cramer, 15 Barb., 118.

LANIER & ANDERSON; HILL & HARRIS, for defendants, cited Dillon on Municipal Corporations, sections 85, *et seq.*, 105, (a.) 417, *et seq.*, 41, 42, 60; City Charter, section 42.

McCAY, Judge.

1. The broadest power to the corporation bearing upon the authority to make the indorsement sought to be enjoined, is the amended charter, act of 1871, page 121. That act authorizes the city to "subscribe to stock in railroads," if it does so at all, by implication only, and perhaps the true construction of it would be that even if there were to be a special grant to subscribe to such stock it could only be done by a vote of the people as there prescribed. But admitting that this act, by implication, confers the power, it by no means follows that under a power to "subscribe stock," is included the power to indorse the bonds of the company. The one power implies a consideration, the city gets the stock; the other is gratuitous, is in its very nature *ultra vires*, since it is entering into a contract of suretyship: 1 Dillon on M. Cor., section 393; 3 Kernan, (N. Y.) 314; 3 Louisiana R., 294. Even partners can-

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not do this without special agreement: Code, section 1914. Such powers to a municipal corporation especially ought to be construed strictly, as they involve the right of taxation upon the people, since, if the power to contract the obligation exists, the right to tax to pay the debt would seem to follow as a necessary corollary. It is useless to cite authorities at this day to establish the proposition that these bodies have no powers except those granted, and that the grants are to be strictly construed.

2. Nor does the general act of 1874, help the matter. Our construction of that act is, that it confers *no power* to issue bonds at all; that it only regulates the manner in which bonds shall be issued, in cases where the power to issue has been, or may be, granted by the legislature. And this idea is, we think, not only plain from the general language of the law, but it is distinctly indicated by the last section, which excludes bonds issued under acts passed by the (then) present legislature from the operation of the act. It would be a very large assumption, we think, to suppose that it was the intent of the legislature to authorize any municipal corporation to issue bonds at its pleasure, provided two-thirds of the people agree to it, and we do not give the act such a construction.

3. The objects of a municipal corporation, are, in the main, the preservation of order, and the doing of such acts for the public good as cannot well be done by private enterprise. But here is a private enterprise, and it is insisted that it is within the scope of municipal power, not to build a street road, but to aid, by a donation of the credit of the city a private corporation, to build it, and to take the profits of it. We do not think this is within the ordinary scope of municipal authority, nor can any authorities, as we believe, be found carrying the objects of a corporation that far. We are clear that the proposed indorsement is *ultra vires*, and that the injunction should have been granted.

Judgment reversed.

Selma, Rome and Dalton Railroad Company vs. Keith.

SELMA, ROME AND DALTON RAILROAD COMPANY, plaintiff
in error, *vs.* **GEORGE W. KEITH**, defendant in error.

1. A motion for a new trial was made during the term of the court at which the verdict was rendered, and sixty days allowed by order for the filing of the brief of the evidence. Such brief was agreed to within the time allowed, but it was not convenient for the judge to hear the motion at the appointed date, so he approved the evidence and ordered the same to be filed without limitation as to time. After the expiration of the sixty days allowed by the first order had expired, a second order was passed, by consent of plaintiff's counsel, that the motion should be heard at such time as would suit the judge:
Held, that the discretion of the judge in refusing to dismiss the motion for a new trial because the brief of evidence was not filed within the sixty days originally appointed, will not be controlled, especially as plaintiff's counsel made no objection on this ground when they consented to the second order above mentioned.
2. Where the question at issue was as to the damage sustained by the plaintiff by reason of the taking of his land for railroad purposes, evidence of its value to the defendant was inadmissible.
3. Upon the trial of such an issue, evidence of the defendant's having backed water upon the plaintiff's land by the erection of a dam, was inadmissible. His remedy would be by an action of trespass.
4. The testimony of a witness to the effect that he was one of a company about to engage in the pork packing business, and had examined the plaintiff's shoal and water power with the view of purchasing it for that purpose, and was willing to give \$6,000 00 therefor; that he thought it was worth that amount, but the other members of the company were not willing to give more than \$5,500 00, was inadmissible. It was entirely too speculative and uncertain as to what was the value of the plaintiff's property at the time it was taken.
5. The statement of a witness that, by reference to a book issued by a company advertising the sale of turbine wheels, he came to the conclusion, taking into consideration the fall that could be obtained, that a twenty horse power could be procured, was inadmissible, the book not being in court, and the witness testifying from his recollection of the assertions therein made.
6. The rule of damages in this case is the actual value of the plaintiff's land taken by the defendant for the use of its road, at the time it was so taken, which may be proved by the opinion of witnesses who were acquainted with and had knowledge of its cash value at that time. As to the consequential damage done to the mill shoal by the defendant's road, the plaintiff may show what was its actual cash value at the time the road was located on his land, and how much and to what extent that value was diminished by such location.

New trial. Practice in the Superior Court. Railroads. Damages. Evidence. Before Judge UNDERWOOD. Whitfield county. At Chambers. May 18th, 1874.

For the facts of this case, see the decision.

PRINTUP & FOUCHE; J. E. SHUMATE, for plaintiff in error.

JOHNSON & McCAMY, for defendant.

WARNER, Chief Justice.

This case came before the court below on an appeal from the assessment of damages for locating the defendant's road on the plaintiff's land under the provisions of its charter. On the trial of the appeal the jury found a verdict for the plaintiff for \$2,580 64. The defendant made a motion for a new trial on the several grounds set forth therein, which was overruled by the court, and the defendant excepted.

1. When the motion for a new trial came on to be heard, the plaintiff made a motion to dismiss it on the ground that a brief of the evidence had not been filed in the clerk's office within the sixty days allowed by the order of the court for that purpose. The presiding judge, before whom the motion was heard at chambers, after hearing the statement of counsel on both sides in relation to the matter, overruled the motion to dismiss, and the plaintiff excepted. The brief of the evidence was made out and agreed to, and signed by counsel on both sides within the time allowed by the first order of the court. It was not convenient for the judge to hear the motion within the time allowed, but he approved the brief of the evidence within the time allowed by the first order, and ordered the same to be filed without limit as to time; and the brief of the evidence was in fact filed on the 13th of January, 1874, but not within the sixty days allowed by the first order. The judge had appointed the 13th day of January to hear the motion, but from some cause it was not heard on that day, but

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was finally heard on the 18th of May, 1874. After the time allowed for filing the brief of the evidence had expired by the first order, another order was made in the case by the consent of the plaintiff's counsel, to-wit; on the 18th day of April, 1874, that the motion for new trial should be heard before Judge UNDERWOOD, who presided on the trial of the case, in vacation, at such time as would suit him to hear it, without any objection or protest at that time, that the brief of the evidence had not been filed in time. When the motion came on to be heard the brief of the evidence had been filed, and the judge having passed a second order for its filing, after his approval of it, without limitation of time, and it having been filed in pursuance of that order within a reasonable time thereafter, and no harm having been done to the plaintiff, either by surprise or otherwise, that we can discover, we will not control the discretion of the presiding judge in refusing to dismiss the motion, the more especially as the plaintiff's counsel made no objection or protest that the brief of evidence had not been filed in time, when they consented to the order of the 18th of April, that the motion should be heard in vacation by Judge UNDERWOOD, when it should suit him to hear it. It was the duty of the plaintiff's counsel to have protested then, or to have refused their assent to the granting that order for the reason that the brief of evidence had not been filed in time, if they intended to insist upon it at the hearing of the motion. If a party fails to speak when it is his duty to speak, he will not be heard afterwards. In our judgment, the court erred in overruling the motion for a new trial.

2. It was error in admitting the testimony of Wells, as specified in the fourth ground of the motion, that defendant had erected a dam across the creek, and was using the water to run a pump to supply the road with water at that station, which was worth to defendant \$40 00 per month. The issue on trial was the amount of damages the plaintiff had sustained from the defendant by the taking of his land for the use of its road, and not what it was worth to defendant, or how profitably it used or employed it, in its business.

3. It was also error in allowing Wells to testify as specified in the fifth ground of the motion, that the defendant had erected a dam across the creek and backed the water on plaintiff's land, and covered two or three acres of it, which was worth \$100 00 per acre. If the defendant had trespassed on the land of the plaintiff by the erection of a dam across the creek, it was liable to an action for such trespass, but that question had nothing to do with the assessment of damages for the taking of plaintiff's land for the use of its road.

4. The court also erred in admitting the testimony of Thomas, as specified in the fourth ground of the motion, that he was one of a company to engage in the pork packing business, and examined plaintiff's shoal and water power with a view to purchase it for that purpose; was willing to give \$6,000 00 for the lot of land and shoal; thought it was worth that amount, but the other members of the company were not willing to give more than \$5,500 00 for it, and he could not get them to give any more. This evidence was entirely too speculative and uncertain, to prove what was the actual value of the plaintiff's land at the time it was taken for the use of the defendant's road, and should have been ruled out.

5. The court further erred in allowing Wells to testify for plaintiff, as set forth in the eleventh ground of the motion, "that by reference to a book issued by a company (Poole & Hunt) to advertise for the sale of turbine wheels, witness came to the conclusion that taking into consideration the fall that could be obtained, a power equal to a twenty horse power could be obtained, and that he so concluded without making any other calculation, said book not being in court, and witness testifying from his recollection of the statements therein made." This testimony was, also, altogether too uncertain and speculative in its character, to establish the value of the plaintiff's land, or any other issue, based as it was upon the recollection of witness as to what he had seen in a turbine wheel vendor's advertisement.

6. Assuming that the charge of the court to the jury was right (and it was not excepted to,) that the defendant could

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only acquire the use of the plaintiff's land for railroad purposes, whatever may be the Alabama charter, and not the fee simple title to the plaintiff's land, then, the verdict was contrary to the charge of the court. Whether the charge of the court was right or wrong, in relation to this point in the case, we express no opinion, as we have not the Alabama charter as recognized by the general assembly of this state, before us, as it was not produced on the argument. The rule of damages in this case, is the actual value of the plaintiff's land taken by the defendant for the use of its road at the time it was so taken, which may be proved by the opinion of witnesses who were acquainted with, and had knowledge of its cash value, at that time. As to the consequential damage done to the plaintiff's mill shoal by the location of the defendant's road, the plaintiff may show what was the actual cash value of the mill shoal at the time the defendant's road was located on his land, and then he may show how much and to what extent that actual cash value of his mill shoal was diminished by the location of the defendant's road upon his land at the time it was located. In other words, what was the actual cash value of the plaintiff's mill shoal before the defendant's road was located on his land? How much, and to what extent, was the actual cash value of the plaintiff's mill shoal diminished by the location of the defendant's road on his land at the time it was so located?

Let the judgment of the court below be reversed.

ROBERT P. SMITH, plaintiff in error, *vs.* JOSEPH HORNSBY
et al., defendants in error.

1. A bought land from B, paying part of the purchase money and giving his note for the balance. He took B's bond for titles when the note was paid, and went into possession of the land. The note not being paid, was sued to judgment in the county of Henry, B living in Campbell county, where the land also was situated. After judgment, and after a portion of it was paid, B took possession of the land under a

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claim that the sale had been rescinded, and sold it to C, and transferred the execution to D, who also resided in Henry, who levied the execution on the land in Campbell county, and C, the second purchaser from B, filed his claim to the land in the superior court of Campbell county. In this state of the case A filed a bill in equity in Henry county against D in Henry, and against B and C, who lived in Campbell county, offering to pay the balance due, demanding a title and the possession of the land:

Held, that the bill should have been filed in Campbell county, and that the court in Henry had no jurisdiction.

2. A was not barred by the statute of limitations.

Jurisdiction. Venue. Statute of limitations. Before Judge HALL. Henry Superior Court. October Term, 1873.

Robert P. Smith filed his bill against W. J. Smith, of Henry county, Joseph Hornsby and James M. Gorman and his wife, Ophelia M., of Campbell county, and Samuel C. Weems, of Spalding county, making, in brief, the following case: On or about October 17th, 1859, one William H. Smith, the brother of the complainant, purchased from Joseph Hornsby certain lands situate in the ninth and fourteenth districts of Campbell county, comprising four hundred and forty-one and one-half acres, more or less, for \$3,000 00. About the same time complainant purchased from his said brother his interest in said land and took a transfer of the bond for titles executed by said Hornsby. This was done with the consent of Hornsby, who received complainant's note for \$1,605 00, the balance of the purchase money, due December 25th, 1860, said William H. Smith becoming security thereon. On March 12th, 1866, Hornsby brought suit against complainant and his security on said note, to the superior court of Henry county, and on October 15th next thereafter, obtained judgment thereon. On or about October 20th, 1867, he collected from the sheriff of Henry county \$792 50, which had been raised from the sale of complainant's property. On November 14th, 1867, said Hornsby conveyed said lands to his step-daughter, Ophelia M. Austell, who has since intermarried with the defendant, James M. Gorman, of Campbell county. Said Ophelia took said deed with a full knowledge of complainant's rights in

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the premises, and with the design of defrauding him out of said land.

In the year 1867, complainant was, on his own petition, adjudged a bankrupt by the district court of the United States, for the northern district of Georgia, and the defendant, Samuel C. Weems, of the county of Spalding, was appointed his assignee. On December 21, 1867, the said Weems, fraudulently combining with the said Hornsby, entered into a written agreement by which he undertook to convey to the latter said bond for titles, held by complainant as aforesaid. Complainant subsequently withdrew his petition in bankruptcy.

In the year 1868, said Hornsby transferred the execution aforesaid to the security thereon, William H. Smith, who subsequently transferred the same to William J. Smith, of Henry county. Said defendant purchased said *fi. fa.* with a full knowledge of the equities of complainant, but he has nevertheless caused the same to be levied on the said lands in Campbell county. The defendants, James M. Gorman and wife, have interposed their claim thereto, which is now pending. There is now due upon said execution about \$1,800 00. The land is worth about \$4,000 00, and is of the yearly value, for rent, of \$500 00. Gorman and wife has been in possession thereof for about five years. Complainant prays as follows:

1st. That the transfer of said bond for titles by Weems, assignee, to Hornsby, be decreed to be null and void.

2d. That the deed to said land executed by Hornsby to Ophelia M. Austell, now Gorman, be decreed to be delivered up to be canceled.

3d. That the defendant, William J. Smith, be enjoined from selling said lands under said levy until the further order of this court.

4th. That the defendants, James M. Gorman and wife, and William J. Smith, be enjoined from having said claim case determined until the trial of this bill.

5th. That the said William J. Smith be decreed to enter

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said execution satisfied upon the payment of the amount due thereon, which the complainant is ready and willing to pay, and that the defendant, Hornsby, be then decreed to convey to complainant, by warranty deed, the lands aforesaid.

6th. That the complainant recover a general judgment against the defendants, Hornsby and Gorman and wife, for the rents aforesaid.

7th. That the writ of subpoena may issue.

A temporary injunction was ordered to issue on February 10th, 1872, and the bill was filed in office on the 2d of the following May.

The defendants demurred upon the following grounds :

1st. Because complainant has an ample common law remedy.

2d. Because the cause of action is barred by the statute of limitations, not having been sued prior to January 1st, 1870.

3d. Because the superior court of Henry county has no jurisdiction of a question involving the title to lands situate in Campbell county, no substantial relief being prayed against the defendant residing in the county of Henry.

The demurrer was sustained and complainant excepted.

D. J. BAILEY ; J. J. FLOYD ; S. C. McDANIEL, for plaintiff in error.

BOYNTON & DISMUKE ; SAMUEL C. WEEMS ; T. W. THURMAN, for defendants.

McCAY, Judge.

No substantial decree is sought against the only defendant living in the county of Henry. The bill admits that the execution is not paid and that complainant is bound to pay it. The whole equity sought is against the parties living in Campbell. The truth is, the Henry county defendant is not bothering the complainant at all. He has no possession of the land. That is held adversely by one of the Campbell county defendants, and so far, the defendant, Smith, resident in Henry is concerned, he is doing the very thing the complainant

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wants—trying to subject the land to this debt. That it is subject, is the whole equity of the bill, and it is absurd to say that Henry county superior court has jurisdiction to decree this against the present holder of the *ft. fa.* when he is doing his very best, by a levy, to secure the sale. We think no substantial relief is sought against the Henry county defendant, and that the bill ought to have been dismissed.

Judgment affirmed.

JEREMIAH W. GOLDSMITH, plaintiff in error, vs. ELSAS, MAY & COMPANY, defendants in error.

(TRIPPE, Judge, was providentially prevented from presiding in this case.)

1. Where two city lots adjoin, the lower lot owes a servitude to the higher so far as to receive the water which naturally runs from it, provided the owner of the latter has done no act to increase such flow by artificial means.
2. The discretion of the chancellor in granting or refusing an injunction, will not be controlled where the evidence produced before him was conflicting.

Injunction. Land. Easement. Before Judge HOPKINS.
Fulton county. At Chambers. August 24th, 1874.

For the facts of this case, see the decision.

W. F. & H. WRIGHT, for plaintiff in error.

SAMUEL WEIL; P. L. MYNATT, for defendants.

WARNER, Chief Justice.

This was an application for an injunction on a bill filed by the complainants against the defendant, to restrain him from running the water from his lot on Pryor street, in the city of Atlanta, on to, against, under and through, the property of complainants. On the hearing of the application for an injunction the defendant's answer was read, and several affida-

vits filed by the complainants and defendant, respectively. After hearing and considering the same, the presiding judge granted the following injunction: "It is considered and ordered that an injunction issue in the foregoing case, restraining defendant from flowing the water from his well, kitchen, gutters, sewers or drains, against the wall of complainants, to the injury thereof; but the injunction will have no reference to such rain-water as may naturally fall or come upon defendant's lot." Whereupon the defendant excepted.

It appears from the evidence in the record, that the defendant's lot is immediately above, and on higher ground than the complainants', so that the water thereon would naturally run off of the defendant's lot on to the complainants' lot. The complainants allege that they are erecting a large and costly brick building on their lot; that defendant is running all the water that accumulates on his lot from his gutters, well and kitchen, directly against, at, and under, and through, the wall of complainants' property, and that defendant dug, or caused to be dug, on his lot, two ditches or drains, leading directly against the wall of complainants, with the *express intention* of conveying and directing all the water accumulating on his lot against, at, under and through, the wall and property of complainants, and has greatly damaged and weakened their said wall, so much so as to render it unsafe; that old and experienced workmen are now afraid to work on complainants' building, for fear of personal injury, etc. The complainants further allege that defendant is pumping out his well nearly every night, to run the water at, under, through and against, complainants' wall, with the *express purpose* to injure their property; that defendant has been notified to desist from running his water on complainants' lot, as before stated, but refuses to do so; that their wall is softened every day by said water, and the danger of falling in is every day increased. The evidence as to the damage done to the complainants' building by the water from defendant's lot, is distressingly conflicting.

1. The principle applicable to the two city lots of the parties in this case is, that as the complainants' lot lies lower than

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the defendant's adjacent lot, the lot of the former owes a servitude to the lot of the latter, so far as to receive the water which naturally runs from it, provided no act of the defendant has been used to create or increase that natural servitude. In other words, the defendant, as the owner of the upper lot, has a natural easement in the complainants' lower lot, to the extent of the natural flow of water from his upper lot, to and upon the complainants' lower lot. As we understand the order of the chancellor in this case, the defendant is only restrained from *flowing* the water from his well, kitchen, gutters, sewers or drains, against the wall of complainants, to the injury thereof; but has no reference to such rain-water as may naturally fall or come upon defendant's lot. The defendant is at liberty to use the water in his well upon his lot as the owners of such property usually do, but if he constructs gutters, sewers, ditches, or drains upon his lot, so as to concentrate the water used upon his lot therein, and thereby cause the water to flow therein against the complainants' wall in a larger volume or quantity than it otherwise naturally would do without the construction of such artificial means, then he would increase the servitude upon the complainants' lot by his own act, the more especially would this be so if he pumped the water out of his well for that express purpose. The injunction only restrains the defendant from *flowing* the water which he uses on his lot by artificial means, other than such as would naturally result from the ordinary use of it as the owner of the lot, against the wall of complainants, to the injury thereof. The ordinary use of the water on defendant's lot for domestic purposes, as the owners of such property usually do, is one thing. The creation of gutters, ditches, sewers and drains on his lot, or the wasting of his water thereon, so as to *flow* the water so used on his lot, by artificial means, against the wall of complainants, is quite another and different thing. The rain-water which naturally falls or comes upon defendant's lot, is not embraced in the injunction, it is only such water from his well, kitchen, etc., in the ordinary use of which he causes, by artificial means, to *flow* against the

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complainants' wall, instead of leaving the same to take its natural course over the surface of his lot.

2. The evidence being conflicting as to the injury sustained by the complainants in consequence of the defendant flowing the water from his lot against their wall, as well as to the manner in which it was done by the defendant, we will not control the discretion of the chancellor in granting the injunction in this case.

Let the judgment of the court below be affirmed.

LEMUEL B. ANDERSON, assignee, plaintiff in error, vs. AUGUSTUS H. LEE, executor, defendant in error.

On the trial of a claim case, it appeared that the execution was against A. B. as principal and C. D. as security; the levy was upon land, and the entry of the same was as follows: "Levied the within *ft. fa.* upon three hundred acres of land, more or less, upon which defendant's family now lives, adjoining land of S. Glass on the west, and others. This 29th December, 1858. Lewis Zachry, Deputy sheriff." The claimant moved to dismiss the levy as not sufficiently certain, which motion the court refused:

Held, that as there were two defendants to the execution, and the levy failed to specify as the property of which defendant the land was levied on, the same was too uncertain, and the motion to dismiss should have been granted.

Claim. Execution. Levy. Description. Before Judge HALL. Newton Superior Court. September Term, 1873.

An execution in favor of Stephen C. Glass against Isham H. Berry and Andrew J. Berry, security, was levied upon certain property, as follows:

"Levied the within *ft. fa.* on three hundred acres of land, more or less, whereon the defendant's family now lives, adjoining lands of S. Glass on the west, and others. This 29th December, 1858. (Signed)

LEWIS ZACHRY,
"D. Sheriff."

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A claim was interposed by William Baily. Subsequently the claimant was adjudged a bankrupt and his assignee, Lemuel B. Anderson, was made a party in his stead. Upon the trial of the issue thus formed, the claimant moved to dismiss the levy because not sufficiently certain. The motion was overruled and the claimant excepted.

The jury found the property subject. A motion was made for a new trial on the above ground of exception. The motion was overruled and claimant excepted.

CLARK & PACE, for plaintiff in error.

J. J. FLOYD, for defendant.

McCAY, Judge.

A levy upon land consists in the entry. There is no other seizure, and the statute, Code, 3640, declares that this entry shall be in writing, shall plainly describe the property levied on and the interest of the defendant therein. And there is great justice and propriety in this requirement. The seizure of one's land and the divesting of the title of the defendant in *fi. fa.* is a high prerogative, and ought only to be done under such circumstances as will do the least harm, and secure to the defendant a fair competition of bidders at its sale. Here was a judgment against two persons, and the land of one of them is seized for sale to satisfy the judgment. The entry, the only levy there is, does not specify whose property it is charged to be. Is there any pointing out of the interest of the defendant? The advertisement of the sale will be of the same character. What sort of notice will that be; and at the sale what will be sold? Whose interest? What will the sheriff's deed declare? The levy is the measure and the description of the thing sold. So far as the defendant is concerned we think this levy entirely deficient. There is, in fact, no description. It is plainly not the intent to say that both the defendants live on the land. The only locality of the premises is that it is the land on which the defendant lives.

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Which defendant? The principal or security? Both are defendants. The other description, adjoining land of Glass on the west and others, is entirely too vague. Had it been adjoining land on which Glass lives, something might be said in favor of the levy. Residence of one on land is a pretty fair description. One who desires to know may easily from this find the whereabouts. But Glass may own land in many places, and a notification that it adjoins Glass' land, amounts to almost nothing. Again, what is the issue to be tried in the claim case? Whose property does the plaintiff say it is? What is there then to try? We think the levy entirely too uncertain for an issue, and that claimant's motion should have been granted.

Judgment reversed.

RICHARD T. GILBERT *et al.*, plaintiffs in error, *vs.* THE COUNTY OF DOUGHERTY, defendant in error.

1. In view of the fact that the grand jury of the county of Dougherty, for the June term, 1872, of the superior court, recommended the ordinary to levy a tax sufficient to defray the county expenses for that year, and of the further fact that the general assembly passed the act of August 26th, 1872, authorizing the ordinary, on the recommendation of the grand jury, to levy an extraordinary tax for county purposes, over and above the per cent. now allowed by law, for the purpose of establishing a poor house and farm, and for defraying the current expenses of said county, etc., the order of the ordinary levying the extra tax under the authority of that act, was not void, and the defendant cannot protect himself, as tax collector, from paying over to the county the money he has collected from the tax-payers on that ground.
2. When the defendant pays over the money in his hands to the county treasurer, the order of the ordinary levying the tax, and the judgment of the court directing him so to pay the money, will afford him ample protection against the claims of the tax-payers.
3. The order of the ordinary levying the tax is the highest and best evidence of his intention as to the amount thereof, his conversation to the contrary notwithstanding.

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County matters. Taxes. Ordinary. Judgment. Evidence. Before Judge STROZER. Dougherty Superior Court. October Term, 1873.

For the facts of this case, see the decision.

D. H. POPE; VASON & DAVIS, for plaintiffs in error.

G. J. WRIGHT, for defendant.

WARNER, Chief Justice.

It appears from the record in this case that the ordinary of Dougherty county issued an execution against Gilbert, as tax collector for said county, and his securities, for the sum of \$6,944 28, for money collected by him for the county in the year 1872, as provided by the 524th section of the Code. The defendant, Gilbert, filed an affidavit of illegality to said execution, on the ground (with others stated therein,) that the extra tax of two hundred and ten per cent. assessed by the ordinary on the state tax, was illegal and without authority of law, as the same was done without the recommendation of the grand jury of the county. By consent of parties, the case was submitted to the court for decision, under the evidence, without the intervention of a jury. The court overruled the affidavit of illegality, and ordered the execution to proceed; whereupon the defendant excepted.

1. It appears from the evidence in the record that the grand jury of Dougherty county, at the June term of the court in the year 1872, recommended the ordinary of that county to levy a tax for that year sufficient to defray the expenses of the county, and that the same be assessed specifically. What expenses the county had incurred does not appear, or whether the tax which the ordinary was authorized to levy under the general law of the state, would have been sufficient to defray it or not. But we find that the general assembly, on the presumed application of the representatives of the people of that county, passed a local act on the 26th of August, 1872, by which it

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is declared that the ordinary of Dougherty county, upon the recommendation of the grand jury thereof, he and is hereby authorized to levy an extraordinary tax for county purposes over and above the per cent. now allowed by law, for the purpose of establishing a poor house and farm, and for defraying the current expenses of said county, etc. If the expenses already incurred by the county, including the current expenses thereof for the year 1872, would exceed the amount which the ordinary was authorized to assess under the general law of the state, then the recommendation of the grand jury could not have been carried out without the enactment of a special law for that purpose. It is therefore a fair and legitimate presumption that the act of August, 1872, was passed in view of the recommendation of the grand jury of the county, made in June, 1872, for the tax had to be levied and collected for that year. Consequently, after the passage of the special act, the ordinary, on the 26th of September, 1872, passed the following order: "It is ordered by the court that the following per cent. be levied for the various purposes therein stated, upon the *ad valorem* state tax for county purposes for the present year, and that the tax collector of said county proceed immediately to collect the same, to-wit: For poor house purposes, thirty per cent.; for jury fund, sixty per cent.; for pauper purposes, fifteen per cent.; for expense of jail and repair of public buildings, twenty-five per cent.; for salary and commissions of county officers, twenty-five per cent.; for outstanding indebtedness and general purposes, fifty-five per cent.; total amount, two hundred and ten per cent." The report and recommendation of the grand jury, made at the October term of the court in 1872, was also put in evidence, from which it appears that the ordinary, under the recommendations of former grand juries, had purchased one hundred and fifty acres of land for a poor house at the price of \$2,000 00, and they recommended that he proceed to have a suitable building erected thereon as soon as the necessary funds are collected, evidently contemplating the funds which were to be collected from the extra tax recommended by the grand jury at the previous

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June term of the court in 1872, and authorized to be assessed by the ordinary by the special act of August, 1872. In assessing the extraordinary tax before recited, the ordinary evidently intended to carry out the recommendation of the grand jury made in June, 1872, as authorized by the act of August, 1872, for he assessed the tax specifically as recommended by them. The extraordinary tax authorized to be levied by the ordinary, upon the recommendation of the grand jury, for county purposes, over and above the per cent. allowed by law, for the purpose of establishing a poor house and farm, and for defraying the current expenses of the county, is not limited to any specific per cent. by the act of 1872. The grand jury, in June, 1872, recommended that the ordinary levy a tax sufficient to defray the expenses of the county, leaving the amount to be determined by the ordinary, and, in our judgment, the act of August, 1872, was passed to enable the ordinary to carry out that recommendation, and in full view of it, and that was the recommendation of the grand jury to which the act had reference, inasmuch as the extra tax was to be levied and collected in the year 1872. If the ordinary levied a higher rate of tax than was necessary for the purpose of establishing a poor house and farm, and for defraying the expenses of the county, then any tax-payer of the county could have restrained him, under the 503d section of the Code. But it is not the tax-payers of the county who are complaining that the extra tax levied by the ordinary was exorbitant or illegal, but it is the tax collector, who has collected the tax levied by the ordinary from the tax-payers, who refuses to pay over the money he has thus collected to the county, for the benefit of the people who have paid it, on the ground that the ordinary had no legal authority to levy it. In view of the fact that the grand jury of the county, at the June term of the court, 1872, recommended the ordinary to levy a tax sufficient to defray the county expenses for that year, and in view of the further fact that the general assembly passed the act of August, 1872, to enable the ordinary to carry that recommendation into effect, the order of the ordinary levying

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the extra tax, under the authority of that act, was not void, and the defendant cannot protect himself, as tax collector, from paying over to the county the money which he has collected from the tax-payers, on that ground. Whilst we should construe the act of 1872 strictly in favor of the tax-payers of the county, yet, in view of the facts as disclosed in the record, we feel bound to give a liberal interpretation to that act as against the defendant, who has collected the tax from the tax-payers of the county, and has the money in his pocket, and refuses to pay it over to the county, on the ground that it was illegally assessed and collected.

2. When the defendant pays over the money in his hands to the trustee of the people of the county, for their benefit, the judgment of the ordinary levying the tax, and the judgment of the court directing him so to pay the money, will afford him ample protection against the claims of the tax-payers from whom he collected the money in his hands under the order of the ordinary.

3. As to the talk between the ordinary and defendant about having levied more tax than he intended, the answer is, that the order of the ordinary was the highest and best evidence of his intention, and until that order was revoked, or set aside, it was binding on the ordinary and the defendant, their outside talk to the contrary notwithstanding.

Let the judgment of the court below be affirmed.

ELDRIDGE JACKSON, plaintiff in error, vs. THE STATE OF
GEORGIA, defendant in error.

[TRIPPE, Judge, was providentially prevented from presiding in this case.]

1. Under the facts of this case, we cannot say that the verdict of the jury is so contrary to or without support from the testimony, as to authorize this court to determine that the judge of the superior court abused his discretion in refusing to set it aside.
2. As the conviction in this case is founded wholly on circumstantial testimony, this court directs that the judge of the court below resen-

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tence the prisoner, and that in so doing, he exercise the discretion vested in him by law, in cases where the conviction is founded solely on circumstantial testimony.

New trial. Sentence. Before Judge KIDDOO. Randolph Superior Court. November Adjourned Term, 1873.

Eldridge Jackson was placed on trial for the offense of murder alleged to have been committed upon the person of his wife, Ann Jackson, on December 29th, 1873. The defendant pleaded not guilty.

The evidence was purely circumstantial, but very conclusive as to the homicide having been committed by the defendant. The deed was done in a drunken frolic growing out of the Christmas festivities. The defendant came home to supper intoxicated and fired off his pistol in the house. Soon after a second shot was heard, which caused a friend to run over to his house, where defendant's wife was found dead. The defendant was seen running from the house, his infant son crying to him, "Lord, papa, you have killed mother." He was arrested with the pistol in his hand. Two barrels had been discharged. He seemed to be unconscious of the act which he had committed. There was no cause of difficulty between him and his wife. They apparently lived happily together.

The jury returned a verdict of guilty. A motion was made for a new trial because the verdict was contrary to the testimony. A new trial was refused and the defendant sentenced to be hanged. To which ruling he excepted.

JOHN T. CLARKE, for plaintiff in error.

JAMES T. FLEWELLEN, solicitor general, by B. S. WORRILL, for the state.

McCAY, Judge.

1. We are not prepared to say that the verdict in this case is so contrary to, or so unsupported by, evidence, that the judge erred in refusing to set it aside. One of the witnesses

hears a shot; he hurries to the place indicated by the sound, which is only a few yards off, and finds at the door a woman with a mortal wound made by a bullet. He sees *running* out of the yard by the back way, the prisoner, who is almost immediately after arrested, with a pistol in his hand recently discharged. On his arrest the prisoner is told he is charged with killing his wife; he does not deny it, but says: "Have I killed my wife? If I did so I did wrong; she was a good woman." He makes no explanation; he does not say it was an accident; he does not set up any excuse or give any reason for the act. By themselves these are strong circumstances to show the prisoner guilty of murder. The books are full of cases founded on circumstances no stronger than this. But it is said that the other circumstances go to show that he is not guilty. It is not pretended that they even *tend* to show the death was not caused by his hand or his pistol. On the contrary, they only add to the proof that the act was his. The argument is that they explain his act; that they show, or afford, fair ground of inference that the killing was accidental, though it is admitted that in any event he must be guilty of involuntary manslaughter in one or the other of its forms. It is said, 1st, that the deceased was his wife, and that the kindest relations seem to have existed between them. 2d, that the prisoner was drunk, and that this shows, or tends to show, an accident probable. 3d, it is said that his having fired off one barrel of his pistol just before, with a very plain intend to hurt nobody, the inference is strong that this, or something like this, was repeated by him with the sad and unexpected result which happened. But they do not explain the important facts that he ran away from the place of the killing almost immediately after it occurred, and that on his arrest, four or five minutes afterwards he made no explanation, set up no excuse, except to ask, "Lord a mercy, have I killed my wife? She was a good woman!" And except, as stated by Davis, that if he had killed his wife, he did not know why he did it. Indeed, these statements, part of the *res gentæ*, rather tend to show that the killing was not accidental. They not only show a failure by

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him, at the time, to set up accident as an explanation, but indicate that he did kill her, though he could not assign a motive for the act. There is, in our judgment, nothing in any of this evidence to justify us in saying that the jury have arrived at a conclusion contrary to the evidence or without evidence. The hypothesis of an accident is a very poor explanation, and has for its basis only the fact of the first shooting, and the want of any proof of bad feeling between the prisoner and his wife. But we know very little of the recesses of the hearts of our neighbors, or of the skeleton behind the door of many with whom we daily associate, and we have no explanation of why the witness, Scott, came to be eating supper there, nor why he quit so suddenly when the prisoner fired the first pistol. Nor do we know what the prisoner thought about his presence there. If, the killing was not accidental, if the shooting was *at* her, the drunkenness of the prisoner cannot help him. If, in his drunken condition, he was jealous, and in the reckless, madness of *drunken* jealousy, he took her life, even with the intent which a drunken man may have, that does not help him. Even *Jones vs. The State*, 29 *Georgia*, 594, does not go so far as to authorize drunkenness to be used as a defense in such a case as that we have supposed.

If this killing was accidental, and only criminal from the want of caution used in doing the act, it is very difficult to explain why he ran as soon as the thing occurred, and why he failed to say it was an accident. If he had sense enough to *consider* that he might be charged with murder, and to run from the house, is it not very strange that he did not have sense enough to say it was accidental when Kirksey arrested him? There is no conceivable explanation of the facts of this case, so as to authorize us to set aside this verdict, except, that the act was accidental, and we are unable to see the force of that explanation. It fails to account for the conduct of the prisoner after the act. Its only foundations, are, as we have said, that it does not appear there was any hard feeling between himself and wife, and that from his conduct just before, it is possible an accident so might have happened in an attempt to shoot

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another Christmas gun. But who can account for the acts of a drunken man? He often gets furious at a trifle, and on the instant, and that with his best friends, and it is just as probable, nay, more probable, that for some slight opposition to his wishes, his drunken passions were aroused, and he killed her in his anger. If this be so, he is guilty, in law. His drunkenness does not excuse him. Society cannot afford to permit such a defense for a killing, even though the guilty person is, for the *nonce*, practically insane. It is a self-imposed condition, and it would, if the excuse were allowed, be the cloak of every assassin. It is no reply to circumstances indicating guilt so strongly as do these, to construct a theory which might account for the killing, without fixing the guilt of murder. If a man be found dead, shot by a pistol bullet, and by a train of circumstances we can trace out the hand which fired the pistol, the law, *prima facie*, presumes malice, either express or implied. And yet, in almost every case, where the killing is not actually seen, it is possible to imagine an accident. Take even the case of Dr. Webster who killed Parkman. No eye saw the deed, but the facts pointed out Webster as the man who disposed of the dead body. Might it not have been as fairly imagined that the killing was accidental in that case as this. True, he tried to hide and destroy the body. But did not this man run from the dead body of his wife, and impliedly admit the killing immediately afterwards?

2. For these reasons we affirm the judgment, though we will direct that the judge resentence the prisoner, and in so doing, exercise the discretion vested in him by law in cases where the conviction is founded solely on circumstantial evidence. We do not suggest what his sentence shall be, but we leave it open to the judge, now that some time has elapsed, to commute the punishment if, as his conscience is at present informed, he thinks that course most consistent with justice, the public interest, the fallibility of human belief, and such charity as is consistent with justice.

Judgment affirmed.



Williams vs. Lampkin & Company et al.

THOMAS R. WILLIAMS, administrator, plaintiff in error, vs.
WILLIAM L. LAMPKIN & COMPANY *et al.*, defendants in error.

1. In a proceeding to attach the defendant to a bill in equity for violating a restraining order of the chancellor, in collecting certain assets of an estate of which he was one of the administrators, it would be technically more correct to specify in the petition what assets had been collected; but as the petition alleged that he had collected a large amount of such assets and converted the same to his own use, a demurrer thereto was properly overruled.
2. Where a defendant has eight days notice of a proceeding to attach him for violating a restraining order of the chancellor, in collecting and converting to his own use a large amount of the assets of an estate of which he was one of the administrators, the facts necessary to sustain such charge being peculiarly within his own knowledge, an application for a continuance was properly overruled.
3. A restraining order has all the force of an injunction until rescinded or modified by the chancellor.
4. The judges of the superior courts of this state, in the exercise of chancery jurisdiction, must necessarily be allowed a large discretion in enforcing obedience to their orders, which this court will not control unless grossly abused.
5. It is within the discretion of the chancellor to rescind or modify his orders at any time, upon sufficient cause therefor being shown, or as the exigencies of the case may require.

Equity. Attachment. Contempt. Injunction. Continuance. Before Judge HALL. Butts county. At Chambers. January 13th, 1874.

For the facts of this case, see the decision.

D. J. BAILEY; Z. D. HARRISON; H. HENDRICK, for plaintiff in error.

SPEER & STEWART; CABANISS & TURNER; PEEPLES & HOWELL, for defendants.

WARNER, Chief Justice.

This was an application by petition of complainants in an injunction bill, to attach the defendant for contempt for the violation of a restraining order of the judge acting as chan-

cellor, made in the cause, pending the motion to grant a permanent injunction. The restraining order granted by the chancellor enjoined the defendant from further collecting, having or using the books, notes, accounts, debts, dues, claims, cash, lands, or other property of the estate of Tanner, of which he was one of the administrators, or removing, using, selling, or offering to sell, or converting to cash, any portion of said estate, which was duly served on the defendant. The petition for the attachment set forth the granting of the injunction, the service thereof on defendant, the appointment of a receiver to take charge of the assets, and alleged that the defendant had violated the injunction by collecting a large amount of assets belonging to the estate of Tanner and converting the same to his own use. The presiding judge, acting as chancellor, granted an order requiring the defendant to show cause why he should not be attached for contempt in violating the injunction, and that a copy of the order be served on the defendant eight days before the time appointed for the hearing thereof. The defendant appeared and demurred to the complainant's petition, which demurrer was overruled, and the defendant excepted. The defendant made a motion to continue the case, which was overruled, and the defendant excepted. The chancellor heard evidence as to the violation of the injunction by both parties, and allowed the defendant to file his answer in explanation of the evidence offered by complainants, and then granted an order that the defendant be imprisoned in the common jail of the county of Butts until he paid the sum of \$700 00 to the receiver appointed for Tanner's estate, that being the amount collected by him after the service of the injunction, and \$25 00 for contempt in violating the injunction, with the cost of the proceeding; whereupon the defendant excepted.

1. The demurrer to the petition was properly overruled. The injunction had been served on the defendant, and he knew the terms of it. It was alleged in the petition that the defendant had violated the injunction by collecting a large amount of assets belonging to the estate of Tanner, and con-

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verting the same to his own use. It would have been technically more correct to have alleged the specific assets of the estate which he collected and converted to his own use, if known to the complainants. But the demurrer admitted that he had collected a large amount of the assets belonging to the estate of Tanner, and converted the same to his own use, whereas, the injunction restrained him from the collection of any part thereof, and having admitted, by the demurrer, that he had collected a large amount of the assets, the legal presumption would be that he had knowledge of the specific assets of the estate, which, by his own act, he had collected and converted to his own use.

2. The motion for a continuance was properly overruled on the grounds stated therefor. The defendant was called on to show cause why he should not be attached and punished for contempt in violating the injunction, and he was served with the rule to show cause eight days before the time appointed for the hearing thereof. The grounds for continuance were, that the defendant did not know what acts of wrong were charged against him, and was taken by surprise by the evidence taken *ex parte* by the complainants against him. The defendant was notified by the rule *nisi* served upon him what was the wrong charged against him, to-wit: the violation of the injunction which had been served upon him by the collection of a large amount of the assets belonging to the estate of Tanner, and converting the same to his own use, and therefore he could not have been surprised when the complainants, on whom the burden of proof rested, offered evidence to sustain that charge; the violation of the injunction was the wrong charged against him, and that was the charge he was called upon to answer; that was the charge which the complainants were bound to establish by competent evidence, and which they did establish to the satisfaction of the chancellor, and what the witnesses knew in relation to his violation of the injunction must have been known to the defendant himself. When the injunction was served on the defendant, it was his

clear duty to have obeyed it. The terms of that injunction have been already recited.

3. It is possible that the defendant may have thought that the restraining order was not binding upon him until the permanent injunction was granted on the hearing therefor, as he says he had no intention to violate it, but the law is, that when an order restraining the party complained of, is granted until the hearing, or the further order of the court, such restraining order shall have all the force of an injunction until rescinded, or modified by the court: Code 3211. Every decree or order of a court of equity, may be enforced by attachment against the person for contempt. Injunctions may also be enforced by attachment: Code secs. 4216, 4218. In this case, after hearing the complainants' evidence as to the violation of the injunction, the presiding judge, acting as chancellor, allowed the defendant to explain that evidence by his answer so far as he was able to do so, but that explanation only went to show that the collecting of the assets of the estate by the defendant, after the service of the injunction, was mainly for the purpose of securing his individual claims against Tanner's estate, which he could not lawfully have done without violating the injunction. Whatever claims he might have had against the estate could only be paid according to the dignity thereof, by the decree of the court marshaling the assets of the estate, and not by an appropriation of the assets of the estate by the defendant himself in payment of his own claims, in violation of the injunction, whatever may be the justice or the dignity thereof. The chancellor ordered the defendant to be attached and imprisoned until he paid over to the receiver the \$700 00 which the evidence before him showed the defendant had collected or received from the assets of the estate, after the injunction had been served upon him, and until he paid \$25 00 for contempt of the order granting the injunction, and the costs. It was said on the argument, that this order of the judge was harsh and oppressive to the defendant; the way of the transgressors is always hard. When the defendant took the responsibility of violat-

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ing the injunction, he did so at his peril. What has the presiding judge, acting as chancellor, done in this case? He ordered the defendant to pay over to the receiver the amount of the assets belonging to the estate, which the evidence before him showed that the defendant had collected or received after the service of the injunction upon him, and imposed a pecuniary fine of \$25 00 for his contempt of the injunction order, including the costs of the proceeding, and that the defendant be attached and imprisoned until he paid the same. The penalty for contempt of the injunction order was quite moderate enough, and it was nothing but right that the defendant should pay over to the receiver the amount of assets belong to the estate, which he had collected or received after the injunction had been served upon him and in violation thereof, and it was competent for the presiding judge, acting as chancellor, to enforce that order by attachment and imprisonment.

4. The judges of the superior courts in this state, in the exercise of the chancery jurisdiction conferred by the laws thereof, must necessarily be allowed a large discretion in granting and enforcing obedience to the orders and processes which they are authorized and required to issue, and this court will not interfere to control that discretion, unless it has been grossly abused. This court has no original jurisdiction to grant or dissolve injunctions, or to exercise its discretion in the enforcement of orders in relation thereto; that jurisdiction and discretion is vested in the judges of the superior courts, and it is to be exercised by them, subject only to be reviewed by this court when the laws of the land, or the principles of equity, have been violated in the exercise of that discretion.

5. It is within the discretion of the chancellor in this, as well as other cases, to rescind or modify his order at any time, upon sufficient cause therefor being shown, or as the exigencies of the case may require. It is one of the first and imperative duties of the citizen, to obey all lawful orders and judgments of the regular constituted tribunals of the state, and it is also the correlative duty of the judicial officers of the

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state, to see to it that all such orders and judgments are respected and enforced, in the exercise of that sound discretion vested in them by law for that purpose. In view of the facts disclosed in the record before us, we will not interfere with the exercise of the discretion of the presiding judge, acting as chancellor, in granting the order complained of.

Let the judgment of the court below be affirmed.

RILEY WILSON, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

On the trial of an indictment for an assault with intent to murder, the jury may, if the evidence warrant it, find the defendant guilty of an assault, but it is not competent for the jury to find a verdict of an attempt to make an assault. There is no such crime, and the verdict is void.

Criminal law. Assault with intent to murder. Before Judge STROZER. Mitchell Superior Court. May Term, 1874.

Wilson was placed on trial for an assault with intent to commit murder, alleged to have been committed on April 3d, 1873, upon the person of one Solomon Davis. The jury found him "guilty of an attempt to make assault." A motion in arrest of judgment was made upon the ground that there was no such crime. The motion was overruled, and defendant excepted.

T. R. LYON ; R. F. LYON, for plaintiff in error.

B. B. BOWER, solicitor general, for the state.

MCCAY, Judge.

We are not clear that, under the evidence, the jury could have found the defendant guilty of even an assault. True, he presented his gun, but he announced an intention to shoot only, on condition, and we are inclined to think it was a con-

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dition he had a right to impose. He was at his own house, and it does not clearly appear that the persons at the gate had any right to interfere with what was going on in the house. Be this as it may, the jury have not found any verdict for an assault. Plainly and in terms, they say they find him guilty of attempt to make an assault. The question is, can any judgment be entered upon such a verdict? Is it a legal verdict? Is there any such crime? The Code, section 4357, defines an assault to be "an attempt to commit a violent injury on the person of another." Under section 4712, to make out an attempt to commit a crime it must appear that the accused has done some act towards the commission of it, and either fail in the perpetration thereof, or be prevented or intercepted in executing the same. As an assault is itself an attempt to commit a crime, an attempt to make an assault can only be an attempt to attempt to do it, or to state the matter still more definitely, it is to do any act towards doing an act towards the commission of the offense. This is simply absurd. As soon as any act is done towards committing a violent injury on the person of another, the party doing the act is guilty of an assault, and he is not guilty until he has done the act. Yet it is claimed that he may be guilty of an attempt to make an assault, when, under the law, he must do an act before the attempt is complete. The refinement and metaphysical accumen that can see a tangible idea in the words an attempt to attempt to act is too great for practical use. It is like conceiving of the beginning of eternity or the starting place of infinity.

Judgment reversed.

SIDNEY A. HUNT, executor, *et al.*, plaintiffs in error, *vs.*
JAMES O. H. PERRY, defendant in error.

Where fraud is alleged by the complainant, it will take an extreme case to induce this court to control the discretion of the chancellor in refusing to dissolve an injunction.

Injunction. Fraud. Before Judge JAMES JOHNSON. Talbot county. At Chambers. October 15th, 1874.

This case is sufficiently reported in the decision.

B. H. BIGHAM, by brief, for plaintiffs in error.

No appearance for defendant.

WARNER, Chief Justice.

This was a bill filed by the complainant against the defendants, praying for an injunction to restrain the sale of a certain described tract or settlement of land, on the ground of the fraudulent conduct and combination of defendants to defeat the complainant's vendor's lien which he claimed on the land for the purchase money due therefor, under a sale made by complainant's father to one Drummond in 1859, under whom the defendants claim, as is alleged, with *notice* of said vendor's lien. The presiding judge granted the injunction prayed for, with leave to the defendants to move for a dissolution thereof on a certain day named in the order. At the time appointed, the defendants made a motion to dissolve the injunction on the filing of the answer of Hunt, one of the defendants, which motion was overruled, and the defendants excepted.

In view of the allegations contained in the complainant's bill, we will not interfere with the exercise of the discretion of the court in refusing to dissolve the injunction, the more especially when fraud is alleged on the part of the defendants, as in this case, which is a question for the consideration of a jury on the final hearing of the cause.

Let the judgment of the court below be affirmed.

Hatcher vs. Jones.

WILLIAM A. HATCHER, plaintiff in error, vs. JOHN E. JONES, president, defendant in error.

That the mortgagor has been adjudged a bankrupt, and the property mortgaged claimed by him in the schedule to his petition annexed as a homestead, (it not appearing that the mortgagee ever proved his debt, or that any steps have been taken in the bankrupt court to contest or discharge his mortgage lien,) are no reasons why the state courts should not proceed to foreclose the mortgage.

Bankrupt. Mortgage. Homestead. Before Judge STROZER. Calhoun Superior Court. March Term, 1874.

On June 4th, 1873, a rule *nisi* issued at the instance of John E. Jones, as president of the Central Georgia Bank, against William A. Hatcher, requiring him to show cause why a certain mortgage executed by him on February 24th, 1871, should not be foreclosed. The defendant was served on June 13th, 1873. He showed for cause that on November 1st, 1873, he was adjudged to be a bankrupt; that on February 7th, 1874, L. D. Monroe was appointed his assignee; that the property embraced in the mortgage aforesaid was set forth in the schedules to his petition attached and claimed as a homestead exemption; and that further proceedings should be stayed until the determination of the bankrupt court on the question of his discharge. The court overruled said showing and ordered a rule absolute to issue; whereupon the defendant excepted.

J. JOHN BECK; A. HOOD, by brief, for plaintiff in error.

C. B. WOOTEN, by R. F. LYON, for defendant.

McCAY, Judge.

The bankrupt was well aware that he had given this mortgage, and it was his own fault to have taken his exemption on the property mortgaged. The bankrupt act expressly preserves the liens of mortgages, and if the mortgagee does not prove his debt, he may proceed with his mortgage without reference

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to the proceedings in bankruptcy. Had the assignee so determined, he might have forced the mortgagee into the bankrupt court. If the claim of the bankrupt for exemption was superior to the mortgage, and it was necessary to settle the rights of the parties, to call the mortgagee before the bankrupt court, we doubt not it could have been done. But unless the mortgagee, either by his own volition or by proceedings for the purpose, is before the bankrupt court, any disposition of property there is always subject to incumbrances.

Judgment affirmed.

THOMAS A. ASKEW, executor, plaintiff in error, *vs.* JOHN A. PATTERSON *et al.*, defendant in error.

1. Ejectment was brought by plaintiffs against defendant for a certain tract of land. The latter had made advances for the benefit of the plaintiffs and of the property now sought to be recovered, and had purchased the land in satisfaction of said indebtedness, at a sale made under the order of the chancellor. This order was attacked by the plaintiffs as illegal :

Held, that even if such order was unauthorized, yet the defendant, having purchased the property in good faith, under color of legal proceedings, might set up the facts aforesaid by an equitable plea, and claim to be reimbursed before a recovery could be had.

2. Where a trust deed was executed prior to the time when the Code went into effect, but the life tenant did not die until after that date, leaving the remaindermen minors :

Held, that the chancellor had authority, at chambers, to appoint a trustee for said minors, and to order a sale of the property.

Ejectment. Trusts. Minors. Equity. Before Judge SCHLEY. Bryan Superior Court. April Term, 1874.

For the facts of this case, see the decision.

GEORGE A. MERCER, for plaintiff in error.

ALFRED B. SMITH, for defendants.

WARNER, Chief Justice.

This was an action of ejectment brought by the plaintiffs to recover the possession of a certain described tract of land in Bryan county, known as "Sterling Bluff." The plaintiffs derive their title to the premises in dispute under two deeds, one made by Middleton in June, 1854, to Charles B. Patterson, trustee, conveying said premises to said Patterson, in trust to and for the sole use and separate benefit and behoof of Mrs. Marion E. Patterson, wife of William Patterson, for and during the term of her natural life, and from and after her death, then in trust for the use, benefit and behoof of all and every the child and children of the said Marion E. Patterson and William Patterson, who may be living at the death of the said Marion E., his, her or their heirs and assigns forever. The other deed was executed by Bolan to Charles B. Patterson in July, 1854, conveying the land sued for to said Charles B. Patterson, in trust to and for the sole and separate use of said Marion E. Patterson for and during the term of her natural life, free from the debts and contracts of her husband, William B. Patterson, or any future husband; and from and after the death of the said Marion E., then in trust for such child or children of the said Marion E., the issue of the present or any future marriage, as the said Marion E. may have living at the time of her death. The plaintiffs in the court below were the children of William and Marion E. Patterson. Marion E. died in April, 1865, and William afterwards. Charles B. Patterson, the trustee, died before Marion E. It appears from the evidence in the record that in January, 1866, the judge of the superior court, at chambers, on the application of the children of William and Marion E. Patterson, by their next friend, appointed James G. Patterson as their trustee, with authority to sell and dispose of said lands and reinvest the proceeds thereof. Afterwards, on the 9th of February, 1871, the judge of the superior court, at chambers, on the application of J. G. Patterson, the appointed trustee, and the children of Marion E. Patterson claiming

under said deeds, (those who were infants being represented by their next friend,) granted an order for the sale of the "Sterling Bluff" lands by the trustee theretofore appointed, for the payment of a debt due Philip H. Behn, and to invest the overplus, if any there be, in accordance with the provisions of the deed creating said trust. The land was sold under this decretal order of the judge, and was bid off by Behn, he being the highest and best bidder, at the sum of \$5,000 00. J. G. Patterson, the appointed trustee, and Magoffin, who appears from the record to have been the next friend of the infant children, made him a deed to the land so purchased, the trustee accepting the indebtedness of the estate which he represented to Behn, as payment of the purchase money for the land. The plaintiffs seek to recover the land from Behn's executor or his tenant, on the ground that they have the legal title to it; that on the death of their mother, Marion E., the trust, under the deed, was executed and the legal title to the land was vested in them, and that the judge, at chambers, had no legal authority to appoint a trustee for them after the death of their mother, and order a sale of the land as *trust property*. To the plaintiffs' action the defendant, as the executor of Behn, filed an equitable plea, in which he alleged, that for several years before the death of his testator, the premises sued for were held by the said James G. Patterson, the appointed trustee, as a trust estate, for the common benefit of the plaintiffs, the children of William and Marion E. Patterson, and that said acting trustee and the estate which he represented as such trustee, had become justly indebted to his testator for services rendered and money and supplies furnished by him to said estate, and to said appointed trustee in charge thereof, for the use and benefit of said estate, and of the plaintiffs as the owners thereof, to the amount of \$11,150 00; that the property was sold under the order of the judge to liquidate that indebtedness; that he purchased the property at the sale for \$5,000 00, and released the balance of his claim of \$6,150 for the benefit of said estate and the owners thereof; that the plaintiffs obtained the full benefit of the compromise, and en-

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joyed the fruits thereof; that they are insolvent, and have no property of any kind, except the property conveyed to the defendant's testator, as hereinbefore stated. The court refused the defendant's request to charge the jury that he was entitled to set up his equitable defense to the plaintiffs' action, but, on the contrary, charged the jury that he could not do so; and also charged the jury that this case was altogether similar to that of *Milledge vs. Bryan*, and was controlled in all its features by that decision; that the appointment of James G. Patterson, as trustee, was void, and that there was no trust estate for the use of which supplies could have been furnished by defendant's testator; whereupon, the defendant excepted.

1. Assuming, as the argument for the defendant in error does, that the trust was executed on the death of Marion E., the mother of the plaintiffs, and that the legal title to the land vested in them, and that there was no trust estate for which the judge of the superior court, was authorized by law, at chambers, to appoint a trustee, and order a sale of the property as *trust* property, still, if the defendant's testator did actually make advances for the benefit of the plaintiffs, or for the benefit of the estate which they are now seeking to recover, and having purchased the property in good faith, under color of legal proceedings, in satisfaction of such advances, it is equitable and just that he should be reimbursed by the plaintiffs to the extent of the advances so made for their benefit, or for the benefit of their estate, to which they are now seeking to enforce their legal rights. Whether the advances made by the defendant's testator were made for the benefit of the plaintiffs or for the benefit of their property now in controversy, would be questions to be decided at the trial, under the evidence in the case.

2. What we have heretofore said in relation to the right of the defendant to file his equitable plea, has been said on the assumption, as contended for by the defendants in error, that the judge of the superior court had no lawful power or authority, at chambers, to appoint a trustee for the minor children of Marion E. Patterson, in January, 1866, under the

trust deed, and to order a sale of the property, at chambers, in February, 1871, as *trust* property of said minor children. But is it true, in view of the facts of this case and the law applicable thereto, that the judge of the superior court, at chambers, did not have the power and authority to appoint a trustee for the minor children of Mrs. Marion E. Patterson, and order the sale of the property as *trust* property. The property was conveyed *in trust* from and after the death of the said Marion E. for such child or children of the said Marion E., the issue of the present or any future marriage, as the said Marion E. may have living at the time of her death. Marion E., the mother, as the record shows, died in 1865, after the adoption of the Code, leaving her children as remaindermen, who were minors. The 2306th section of the Code declares that "trust estates may be created for the benefit of any female, or *minor* or person *non compos mentis*." Although the deed of trust in this case was executed prior to the adoption of the Code, the right of the children to the possession of the property under it did not accrue until the death of their mother, in 1865. Until the time of her death, it could not have been known whether she would leave any child or children living at that time, or how many, and therefore the necessity of having a trustee for them did not arise until after the death of their mother. When their right to the possession of the trust property did accrue to them they were minors, and incapable of managing it, and the trust having been created for their benefit, and the trustee appointed by the deed being dead, the judge of the superior court, at chambers, in 1866, did have, in our judgment, the lawful power and authority, under the provisions of the Code, to appoint a trustee to manage it for them during their minority, and to order a sale of the property in 1871. In the case of *Milledge vs. Bryan*, 49 *Georgia Reports*, 397, Mary Milledge died, and the legal estate vested in the children of Catharine Milledge, before the adoption of the Code, and the orders of the judge of the superior court, at chambers, appointing John Milledge trustee for his wife and children,

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and directing the execution of the mortgage, were also made before the adoption of the Code, and that constitutes the difference between the facts of that case and the facts of the case now before us. In the case now under consideration, the trust continued so long as the remaindermen under the trust deed were incapable of managing their property in their own right, and hence it was the duty of the judge of the superior court to appoint a trustee, as was done in this case, to manage it for them during their minority. By the provisions of the Code a trust estate may be created for the benefit of a minor, and that being so, there was something for the trustee to do after the death of Marion E., the mother, to-wit: to protect the property of her children during their minority. In our judgment, in view of the facts of this case as disclosed by the record, the court erred in its charge to the jury as set forth therein.

Let the judgment of the court below be reversed.

THOMAS J. BOYNTON, plaintiff in error, vs. PETER W. TWITTY et al., administrators, defendants in error.

On the trial of an issue formed in answer to a rule *nisi* to foreclose a mortgage, the defendant set up that the note, to secure which the mortgage was given, was made and secured, not for any consideration then passing or existing, but to indemnify and secure the plaintiff to the amount of the note against loss in a certain partnership business e'c., and that he had suffered no loss:

Held, that as the note did not express any specific consideration, but was only for value received, it was competent for the defendant to show by parol what was the real consideration, and that no loss had come to the plaintiff as contemplated.

Evidence. Promissory notes. Before Judge KIDDOO. Dougherty Superior Court. April Adjourned Term, 1874.

On February 11th, 1869, Peter W. Twitty and B. F. Cochran, as administrators upon the estate of John M. Coch-

ran, deceased, instituted proceedings against Thomas J. Boynton to foreclose a mortgage on certain property, executed by him on October 3d, 1859, to secure the payment of two promissory notes, one dated December 9th, 1857, payable one day after date to John M. Cochran or bearer, for \$2,300 00, with credits thereon amounting to \$708 16; the other dated June 26th, 1858, payable as the first, for \$1,800 00, "value received."

The defendant showed for cause as follows: John M. Cochran, the plaintiffs' intestate, William J. McBryde and the defendant, were partners doing business under the firm name and style of Boynton, Cochran & Company. The defendant had become seriously embarrassed from certain individual debts and from having allowed his name to be used as security for his brother C. A. Boynton. It was apprehended that these liabilities might destroy the business of the firm, in which event it was stipulated and agreed that McBryde would be damaged \$2,300 00 and Cochran \$1,800 00. The note for \$1,800 00 was given to the latter for his protection, and the mortgage subsequently executed to secure the same. Neither said firm of Boynton, Cochran & Company, nor Cochran, sustained any loss from said individual liabilities of defendant, as he paid them off. Thus there has never been any breach of the mortgage, and said instrument, as well as the note for \$1,800 00, has answered its purpose.

The plaintiffs introduced the mortgage and the note for \$1,800 00 and closed.

The defendant proposed to prove by William J. McBryde, the facts stated in his plea. On objection made, said evidence was excluded upon the ground that it altered and varied the written contract, and defendant excepted. The jury returned a verdict for the plaintiffs for \$1,800 00 principal, with interest. Error is assigned upon the above ground of exception.

R. N. ELY; VASON & DAVIS, for plaintiff in error.

WILLIAM E. SMITH; G. J. WRIGHT, for defendants.

McCAY, Judge.

That this promissory note is secured by mortgage, does not, in our judgment, alter the rules of evidence upon the existence or amount of the debt. On the trial of the issue, which the statute provides for, the defendant may set up any defense he might set up in an ordinary suit instituted on the debt secured. We think, too, that the evidence sufficiently shows that the note secured is the same \$1,800 00 note the witness alludes to, to allow the evidence to go to the jury, if it be otherwise unobjectionable. We think it very clear, too, that the witness is competent to testify notwithstanding the death of Cochran. He is not the other party to the cause of action on trial. True he says the defendant made a note to him, on the same consideration as he made this note to Cochran, but the contract was a distinct thing with each, and the witness did not have, and does not have, any interest in the defendant's note to Cochran. At last, therefore, the only question is, was the evidence competent? Was it an effort by parol, to alter or vary the terms of a written instrument? The evidence affirms the terms of the note, except that whilst the note professes to be for value received, the parol evidence says that no cash or property passed; that no debt existed, but that the note was given to indemnify Cochran to the amount of \$1,800 00 against a contemplated loss, by reason of the anticipated failure of Boynton. Is this varying, the terms of the note? Is this within the meaning of the rule, that parol evidence is not admissible to vary or explain a written instrument?

By the common law, the burden was always on the plaintiff to prove the contract sued on was for a legal consideration. If the suit was on a written contract, and the consideration was set out, then the proof of the execution of the writing was sufficient; but if there was no acknowledgment of the consideration in the writing, it was necessary for the plaintiff to show it by proof, and so settled was the rule that in cases coming within the statute of frauds, where the agreement was

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required to be in writing, the courts held that the writing must express what the consideration was. But promissory notes and bills of exchange, under the Statute of Ann, and the custom of merchants, stood on a different footing. In them no consideration was required to be shown; they imported, *prima facie*, a consideration. Even the words value received are not necessary. But this presumption was only *prima facie*, and might be rebutted by showing the truth of the case: See Chitty on Bills, where the subject is fully discussed, and the authorities cited. The acceptor of a bill of exchange or the indorser of a note, are presumed, the one to have funds of the drawer, and the other to have received value for the note on a transfer of it; and yet it has long been well settled that they both may show by parol the contrary, and that they became parties to the paper as security, and for the accommodation of the maker. It is no contradiction. A note or bill rarely does set forth the consideration; it is either silent on the subject or is in general words, as on account or for value received. And the authorities are uniform that the true consideration may be shown. The case where an acceptor of a bill, or indorser of a note, is allowed to show that he got no value, and was only an accommodation acceptor or indorser, is a familiar one. And yet this is, in substance, the very case at bar. A accepts a bill of exchange. The law assumes that he has funds of the drawer in hand. That is the legal effect of his contract, and yet he is allowed to show that he did not have funds; that he was only a surety, and if the holder knew the facts he will be liable for any act in violation of the rights of the surety. The case of Soley, executor, vs. Hind, executor, 6 Car. & Payne, 316, was very like the case at bar. There a man had given his promissory note in the usual form for £100 00. It was pleaded and proven that the note was given in consideration of certain services that the maker expected the payee to render in executing his (the maker's) will, he having appointed him executor; it was then proved that the payee died before the maker, and that the consideration had thus failed. It is sometimes difficult to say

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when the parol evidence offered is a mere explanation of the consideration, and when it is an attempt to attach a condition to the contract, and it is hard to reconcile all the cases for this reason. The line of distinction is often so dim that one mind sees the case on one side of it, and another mind sees it on the other. Without doubt, you may always, in the case of a promissory note, show by parol what was the true consideration; that is, what the maker got, or the payee suffered or lost, or what was the motive that led to the making of the paper. If this motive was not, in law, a valid consideration, or has failed, or if the payee has, on his part, violated some undertaking, expressed or implied by law on his part, so that the consideration has failed, or has proved to be no consideration, then the whole facts may be shown by parol. But if the thing proposed to be proven attaches a condition to the note, as that in a certain event it is not to be paid, or is to be paid at a different time from the time stated, or not to be paid in money, etc., then parol evidence is inadmissible. In the case of *Lester*, the consideration was the services of the attorneys; and it was attempted to be shown that it was agreed that the note should not be paid unless the services proved effective. In the *Sewing Machine* case, the consideration was the sewing machine, but it was proposed to show that the note was to be given up if the defendant's wife should object. So in the cases at the last term against *Thompson* and others. The note was, on its face, given for the premium on an insurance policy actually issued, and it was attempted by parol to alter not only the note but the contract of insurance, by showing that the defendant was to have the right, at his pleasure, to withdraw from the bargain. But the case at bar stands on a different footing. Here the parties feared loss, and it was agreed that the loss might go as high as \$1,800 00, and this note was given and secured to protect the plaintiffs' interest against that loss. The consideration was good. But it turned out no loss has accrued. The consideration has failed. It stands on the footing of a note or acceptance placed as collateral to cover future advance, in which case the courts

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hold that the note or acceptance is good only for the amount of the advances. If this testimony is true, this note was never intended for negotiation, and as between the parties this fact may always be inquired into.

Judgment reversed.

**WILCOXEN MANUFACTURING COMPANY, plaintiff in error,
vs. BOHANAN & MORGAN, defendants in error.**

1. A letter from the book-keeper of a manufacturing company to the defendants, without further proof of his authority, is inadmissible to show that the goods of said company were not sold to the defendants, but sent to them on consignment.
2. The evidence being conflicting, a new trial will not be ordered.

Principal and agent. New trial. Before Judge BUCHANAN. Campbell Superior Court. February Term, 1874.

For the facts of this case, see the decision.

DOUGLASS & TURNER, for plaintiff in error.

No appearance for defendants.

WARNER, Chief Justice.

This was a suit instituted by the plaintiff, in a justice's court, against the defendants, on an account for one bale of cotton yarns, of the value of \$100 00. The defendants alleged in their plea to the plaintiff's suit against them, that they never purchased the cotton yarns from the plaintiff as charged in its bill of particulars, but received the same to sell for plaintiff on consignment, and that said yarns were destroyed by fire by the burning of their store-house in the town of Palmetto, without any neglect or carelessness on the part of defendants. An appeal was taken from the decision of the justice's court to the superior court, and on the trial of the appeal in the last named court, the jury found a verdict

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for the plaintiff for the sum of \$11 40. The plaintiff made a motion for a new trial on two grounds: 1st. Because the court erred in admitting in evidence the contents of a letter of one Randall against the plaintiff. 2d. Because the verdict was contrary to the evidence, and decidedly against the weight the appointment of the receiver:

of the evidence. The motion for a new trial was overruled, and the plaintiff excepted. The main question in issue between the parties at the trial was, whether the bale of yarns was sold by the plaintiff to the defendants, or sent to them to be sold on consignment for and on account of the plaintiff. On this point in the case the evidence in the record is conflicting. In the letter of one of the defendants ordering the yarns, nothing is said about ordering the same to be sent to the defendants to be sold by them on commission or consignment. In proving the contents of the Randall letter, one of the defendants stated that the letter said "that we must make the yarns net the company \$1 75 per bunch." The loss or destruction of that letter was not shown by the evidence contained in the record, so as to authorize the contents thereof to have been proved at the trial. Besides, it was not shown that Randall was the authorized agent of plaintiff to sell cotton yarns, or to forward the same to defendants or other persons, to be sold on commission or consignment. It only appears from the record that Randall was the book-keeper of the plaintiff. Whether the letter was sent with the yarns, or when it was written, does not appear. In our judgment, the court erred in allowing the defendants to give in evidence the contents of the Randall letter against the plaintiff, on the statement of facts disclosed in the record. The evidence being conflicting, according to the uniform rulings of this court, we should not have interfered with the verdict on the ground that it was contrary to the evidence.

Let the judgment of the court below be reversed.

M. H. VANDYKE, plaintiff in error, vs. B. A. MARTIN et al.,
defendants in error.

1. Where several forty acre tracts of land were levied on and sold separately by the sheriff, all for less than the amount of the execution :
Held, that as each lot was sold separately, the question of an excessive levy and sale did not arise.
2. Where several lots of land are levied on by the sheriff under a valid execution, and are duly advertised, as the law provides, and are duly sold to the highest bidder, at the proper time and place, and in the mode prescribed by law, without any fraud or extraordinary circumstances to keep people from the sale, the purchaser gets a good title, however inadequate the price.
3. Where a bill charges that purchasers at a sheriff's sale, combined with the sheriff and each other to deter persons from bidding at the sale, it is error in the judge to dismiss the bill for want of equity, although he may be well satisfied from the answer that the charge is untrue. He may, for this reason, refuse an injunction prayed for, but the issue made by the bill presents matter for a trial by the jury.

Injunction. Execution. Levy. Judicial sale. Before Judge KNIGHT. Lumpkin Superior Court. April Term, 1874.

This case was before this court at its last term : See 52 *Georgia Reports*, 56. An amendment was filed and a second application for injunction made.

M. H. VanDyke filed his bill against B. A. Martin, John A. Parker and William H. Satterfield, sheriff of Lumpkin county, making, in brief, the following case :

An execution for \$502 00 principal, and \$57 00 interest, issued in favor of the defendant, Martin, against Benjamin F. Hamilton, as principal, and complainant, as security. At the time of the rendition of the judgment on which said execution was based, and thereafter, Hamilton was in possession of ample property from which the money could have been made, of which Martin had notice. The aforesaid sheriff, colluding with Martin to injure complainant, on April 28th, 1869, made a grossly excessive levy on a half interest in lots of land numbers eight hundred and twenty, eight hundred and sixty-one and nine hundred and thirty-one, and on the whole of

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numbers eight hundred and fifty-nine, eight hundred and ninety and nine hundred and thirty-four, in the twelfth district and first section of Lumpkin county, each lot containing forty acres, more or less, which property was known as "Slover's Branch Gold Mines," the same being levied on as belonging to Hamilton. The lands embraced in this levy were, and are, of the value of \$10,000 00. This property was advertised for sale in the "Mountain Signal," a paper published in the town of Dahlonega, in said county, having but a limited circulation. In pursuance of said advertisement, the sheriff, after having perpetrated a gross fraud upon complainant, as security, by making such an excessive levy, did sell said lands at public outcry to the defendants, Martin and Parker, for the inadequate sum of \$66 00. The said defendants combined to prevent person from bidding and thus deter competition. Complainant insists that by reason of the above stated facts, he is discharged as security. Notwithstanding the fraud practiced upon complainant, the defendant, Martin, has caused the execution aforesaid, to be levied upon his property, and has had the same advertised to be sold. Prayer that proceedings under said levy be enjoined, and that said execution be decreed paid, so far as complainant is concerned, or that the property of Hamilton, sold as aforesaid, to defendants, Martin and Parker, be resold, complainant tendering the expenses, etc., of said previous sale.

The answers of the defendants are unnecessary to an understanding of the decision. They deny that the levy was excessive, and in support thereof show that each lot levied on, was sold separately, and did not approximate in the amounts for which they were respectively bid off, to the sum due on the execution. They claim to be purchasers in good faith, at a regular judicial sale, and ask to be protected. Deny all collusion, etc.

Several affidavits were introduced as to the value of the lands levied on. They are omitted as immaterial.

The chancellor refused the injunction and dismissed the bill, to which complainant excepted.

WIER BOYD; JOHN A. WIMPY, for plaintiff in error.

W. P. PRICE, for defendants.

McCAY, Judge.

1. We see no error in the refusal of this injunction. Taking the bill and answers together, what equity the bill has, is in our judgment, completely sworn off. Even admitting the land sold to be of the value set up by the complainant, there is nothing in the charge of an excessive levy, since, as the answer shows, and as was the law, the lots were separately sold. Nor is the contrary charged in the bill. The mere *levy*, especially upon real estate, when there is no actual seizure, is a small matter. As the lands were not in a body, they were separately sold, and if the sale was otherwise valid, it seems to us immaterial how extensive was the levy and entry. The charge of tampering with and keeping away bidders is directly and positively denied. There is nothing left but the simple charge that the price was grossly inadequate. Is this sufficient? We think not.

2. This was neither a private sale, nor a sale by order of court. But a technical sheriff's sale, under ordinary process of execution. Without doubt a private sale may be for so grossly inadequate a price as to carry upon its very face an evidence of fraud and imposition. So, too, it may not be unusual, in sales made by masters or commissioners, under orders in chancery, when the sale is never treated as complete until the report of the matter has been acted upon by the court, to order a new sale when the price has been grossly inadequate, though even under such circumstances, the rule has not been uniform. But we have not found a case where a regular sheriff's sale, under ordinary process, has been set aside for simple inadequacy of price. Something more must appear—a want of due advertisement, some unusual circumstances, to keep away bidders, some fraud or management, to produce the result, etc. A sale under execution is a forced sale from its

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very nature. But it is made by a public, sworn and bonded officer. The law fixes the time, place and manner of it, as well as the nature and extent of the notice of it, and it is to the highest bidder, and for cash. Such sales are often very hard upon defendants, but they are the stern result of the positive laws of the land. The law points out what shall be done. It takes wise and humane steps for full notice. It requires due advertisement. It establishes a fixed day and fixed hours for the sale. It provides a public place—the court-house door—and having done this, it, in our judgment, does and can do no more. If, after all the legal steps have been taken, the highest bid is still less than the true value, there is no help for it. As a matter of course, if there be fraud or trick, in which the purchaser participates, or of which he has notice, the sale is bad. There are cases, too, where, by accident of storm or flood, or other unusual occurrence, people have been kept away, in which the courts have interfered. But for mere inadequacy of price, so far as we know, there has not been interference. Nor is it proper that there should be any such interference. In the first place, it is the right of the creditor to sell, and if he has complied with the requirements of the law, it is unjust to him to interfere with the right, and it is the very highest public policy that these sales shall, when made in conformity to law, be binding. Who would bid at such a sale if his purchase were to be open to question for inadequacy of price? The true interest of defendants is against any such rule, since they could but suffer by the uncertainty it would beget. In this particular case, we think, too, that the inadequacy is badly made out. There seems to have been the usual number of persons present, and the very fact of the small price indicates what was the common opinion of the value. In all, there seems to have been but one hundred and eighty acres sold, and that in parcels, to-wit: the half of three lots and the whole of three lots, each lot being forty acres. As wild, unsettled mountain land, the price is not very low. The value insisted on is that value which the belief of the witness places on it, from the gold upon

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it. How variable, uncertain and speculative is this dependence upon mere opinion, changing with each new test, and depending often upon the *fever* raging or not raging. Who has not known of many just such things; land of fabulous price to-day and worthless to-morrow, in high demand the third day, and a drug upon the market the fourth. But, as we have said, if the sale was fairly made, after proper and legal advertisement, at the time and place and in the manner fixed by law, the inadequacy of the price, though to be regretted, cannot be helped. We think, therefore, the court did right to refuse the injunction.

3. There is, however, a positive charge in the bill that the purchasers colluded with the sheriff to keep off bidders, and that, for this reason, the lands brought an inadequate price. True, this charge is positively denied by the answer, and the judge did right in refusing the injunction. But with this charge in the bill we do not think it demurrable. The truth of the charge was for a jury; the complainant may controvert the answers, and we think he has a right to go to a jury on the point. Whilst, therefore, we affirm the judgment refusing the injunction, we reverse the order dismissing the bill.

THE CHATTAHOOCHEE MANUFACTURING COMPANY, plaintiff in error, *vs.* DANIEL C. SHULTZE, defendant in error.

Where no error of law is complained of, the discretion of the court below in refusing a new trial will not be interfered with unless abused.

New trial. Before Judge BUCHANAN. Troup Superior Court. May Term, 1873.

A report of this case is unnecessary.

C. W. MABRY, for plaintiff in error.

LONGLEY & HARRIS, for defendant.

Keaton vs. Baggs & Stephens *et al.*

WARNER, Chief Justice.

It appears from the record in this case that Holly was indebted to the plaintiff, by note, the sum of \$325 00; that the plaintiff sued out an attachment against the defendant, Holly, and garnished the Chattahoochee Manufacturing Company, which garnishment was served on the company on the 1st of April, 1870. In answer to the summons of garnishment the company denied its indebtedness to the defendant, except in the sum of ten cents. The plaintiff traversed the answer of the garnishee, and on the trial thereof, the jury found a verdict in favor of the plaintiff for the sum of \$325 00, with interest. A motion was made for a new trial on the ground that the verdict was contrary to the evidence, and decidedly against the weight of the evidence, and contrary to the principles of justice and equity; which motion was overruled by the court, and the defendant excepted. There is no error of law complained of in this case. The court below, in the exercise of its discretion, overruled the motion for a new trial, and this court, in accordance with its repeated rulings heretofore made, will not interfere to control that discretion.

Let the judgment of the court below be affirmed.

JAMES K. P. KEATON, trustee, plaintiff in error, vs. BAGGS & STEPHENS *et al.*, defendants in error.

Where a deed was made to A, in trust for his own use during his life, and for the support and education of such children as might be born to him, and if he die without children, remainder to the children of B, and A, before he had children, contracted a debt for supplies for his farm on said land, and upon suit being brought against him, as trustee, under sections 3377 *et seq.* of the Code, charging that the debt was contracted for the use of the estate, and describing the land, but not setting forth the terms of the trust, A making no defense, a judgment was taken subjecting the *corpus* of the whole land to the debt, and ordering the same sold to satisfy it, and execution issued and the sheriff was proceeding to sell the same accordingly:

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- *Held*, that it was error in the judge, on a bill filed by A setting out the deed and averring that the debt was the debt of A alone, to refuse to enjoin the sale. The judgment was a breach of trust by A, and by the plaintiff, and equity will protect the beneficiaries other than A. The judge should have granted the injunction, directed the bill to be amended by making the remaindermen now existing, parties, appointing guardians *ad litem*, if they be infants, and on final decree, subject the interest of A to the debt, with full protection to the rights of his unborn children, should he have any, and of the remaindermen, should he die without children.

Equity. Injunction. Trusts. Remainders. Debtor and creditor. Before Judge STROZER. Dougherty county. At Chambers. October 30th, 1874.

This case is sufficiently reported in the above head-note.

SMITH & JONES, by R. H. CLARK, for plaintiff in error.

WARREN & ELY, for defendants.

McCAY, Judge.

It is very plain, from the terms of the trust deed, that the interest of the remaindermen is not subject to the debts of the life-estate tenant, and that the judgment he has allowed to go against him, as trustee, is an unjust and illegal appropriation of the interest of the remaindermen to his (the trustee's) private interest. The judgment was a *devastavit*, and a court of equity will not permit it to be enforced against the remaindermen. It is the duty of the trustee to interfere, and he does so as trustee: See the case of *Wingfield, administrator, vs. Virgin et al.*, 51 Georgia, 139. We think, however, it would be competent for the defendant to reply and make the proper parties, and have the interest of Keaton subjected to his claim. Let guardians *ad litem* be appointed for the minors, and a court of equity could formally and precisely, by its decree, secure and provide for the payment of the debt without detriment to the rights of the remaindermen.

Judgment reversed.

Georgia Manufacturing and Paper Mill Company *vs.* Amis.

GEORGIA MANUFACTURING AND PAPER MILL COMPANY,
plaintiff in error, *vs.* THOMAS P. AMIS, defendant in error.

Subscription to the stock of an incorporated company does not create a statutory liability. Right of action thereon is barred at the expiration of six years.

Statute of limitations. Before Judge BUCHANAN. Coweta Superior Court. March Term, 1874.

For the facts of this case, see the decision.

J. B. S. DAVIS, for plaintiff in error.

A. H. COX ; AUSTIN & HARRIS ; P. H. BREWSTER, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant on a promissory note, for the sum of \$159 10, dated 27th December, 1869, due one day after date. To this action the defendant pleaded as a set-off, a subscription to stock made by the plaintiff to defendant on the 14th day of June, 1866. On the trial of the case, the court charged the jury: "If you believe, from the evidence, that more than six years had elapsed after defendant's right of action accrued on the subscription, before the same was pleaded as a set-off to plaintiff's suit, and in the absence of proof to the contrary, I charge you that the right of action accrued at the time of the subscription, and that the right of the defendant to plead the subscription of the plaintiff as a set-off to plaintiff's suit in this case, was barred by the statute of limitations." This charge of the court, is the error complained of here. It is insisted by the plaintiff in error that this subscription for stock comes within the 2916th section of the Code, which declares, that all suits for the enforcement of rights accruing to individuals under statutes, acts of incorporation, or by operation of law, shall be brought within twenty years after the right of action

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accrues. The liability of the plaintiff on his stock subscription, or the right to enforce the same, did not accrue to the defendant under any statute, act of incorporation, or by operation of law, but the right accrued to the defendant by virtue of the plaintiff's individual contract as specified in his stock subscription. It was that individual contract of the plaintiff, which gave to the defendant the right of action against him, and if that right of action was not enforced within six years from the time of the accrual thereof, then it was barred by the statute of limitations. We find no error in the charge of the court to the jury in view of the facts disclosed by the record.

Let the judgment of the court below be affirmed.

MYERS STERN, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. Where, on the trial of a charge of permitting a minor to play billiards without the consent of his parents or guardian, there was proof going to show that the defendant honestly thought the minor was of full age: *Held*, that it was error to find the defendant guilty simply because the proof was positive that the young man was, in fact, a minor, without regard to any evidence going to show an honest mistake, after proper caution, by the defendant.
2. In such a case it is not an absolute requirement of law that inquiry shall be made of the parent or guardian.

Criminal law. Mistake. Minors. Before Judge RICE. Clarke Superior Court. February Term, 1874.

Myers Stern was tried at the November term, 1873, of the county court of Clarke county for the offense of allowing a minor, Frank Talmadge, to play at billiards without the consent of his parent or guardian. The evidence made out a *prima facie* case for the state, but for the defense it was shown that Stern, before allowing Talmadge to play on his table, had inquired as to his age and had been informed by said minor

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that he was an adult; that he appeared to be over twenty-one years of age, and that he was, in fact, within six months of maturity at the time that he indulged in the aforesaid game.

The county court refused to consider this testimony, holding that upon proof of the playing of the game with the knowledge of the defendant, of the minority of Talmadge, and of the absence of the consent of his parent or guardian, conviction was the inevitable result.

The case was carried by *certiorari* to the superior court, where the judgment of the county court was affirmed, and defendant excepted.

T. W. RUCKER, for plaintiff in error.

EMORY SPEER, solicitor general, by W. B. THOMAS, for the state.

McCAY, Judge.

1. We agree with the counsel for the plaintiff in error that the county judge did not take a proper view of the law on the trial. To make a crime, there must be the union of act and intent, or there must be criminal negligence. It is not conclusive evidence of guilt on the part of the defendant that he permitted this young man to play at his table; that the young man was, in fact, a minor, and that the parent did not consent. These facts, it is true, make a *prima facie* case, and if they stood alone, the guilt of the defendant would be manifest; but evidently there was evidence of another element in the case, which, by the return of the county judge, is shown not to have been considered by him in arriving at his conclusion. There was evidence going to show that the defendant might have been honestly mistaken as to the age of the young man. It is clear to us that if the defendant, after due diligence, thought honestly that this young man was not a minor, he is not guilty. If he did so think, after proper inquiry, the element of intent does not exist; the act was done under a mistake of fact. In such a case, there is no guilt and no

crime. This is the doctrine of all the books, and is, besides, common sense and common justice.

2. Nor is there anything in the nature of this offense which alters the rule. If one who shoots down his dearest friend by mistake, supposing him to be a dangerous wild beast or a burglar, is not guilty of any crime, surely one who permits a minor to play billiards without the consent of the parent, under the honest belief that he is not a minor but of full age, is not guilty. In both cases, however, to excuse the guilt there must be no want of proper caution on the part of the accused. He must have used due diligence, according to the circumstances and the nature of the case. But if he do this, and the evidence show that after such caution he is still honestly mistaken, he is not guilty. We are not prepared to say that the evidence here is *conclusive* of an honest mistake. We do not say that the defendant was bound to have inquired of the parent. That would depend on his accessibility, and on the strength of the other circumstances indicating full age. It is impossible to lay down any general rule. Each case must depend on its own nature and circumstances. From the very nature of this offense special diligence is necessary. Everybody knows that there is uncertainty in such cases, and as the law has made the age of any billiard-player important, even in spite of this liability to mistake, every saloon keeper should act in view of the fact that he is dealing with an uncertain thing. The man who throws a heavy weight from the top of a building is bound to a greater caution if he does it in a city or town, and into a street, than if he does it in the country, and into a little traveled road. As we have said, we do not think this evidence establishes conclusively that the defendant was honestly mistaken. We incline to the opinion of Judge Rice that there is some evidence to justify the finding, and had this conviction been by the verdict of a jury, under a legal charge as to the law, we should hesitate to disturb it. But the record shows the county judge did not consider the question of intention; he acted on the idea, that as the proof was clear of minority, the law had been violated,

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whatever might have been the honest opinion of the defendant. He held him to be bound to inquire of the parent—nay, on the general rule he acted on, he, perhaps, would have found him guilty if he had inquired of the parent—had the parent, either by mistake, or untruthfully, answered that the son was of age. It appears, therefore, that on the trial of this case, the judge, who acted as judge and jury, mistook the law, did not consider the evidence going to show an honest mistake, after due caution, and we send the case back to be tried again under a proper view of the law, to-wit: the defendant is not guilty, if, under all the circumstances, he honestly thought the young man not to be a minor, and the diligence required is that reasonable diligence which, in view of the nature of the case, a good citizen and prudent man would use.

Judgment reversed.

JOHN PURYEAR, plaintiff in error, *vs.* A. C. CLEMENTS *et al.*, defendants in error.

1. The use of a private way through the improved lands of another for a period of seven years, to constitute a prescriptive right, must be shown to have been uninterrupted.
2. Where a private way was established at the instance and expense of the defendant, he is not bound to keep the same in repair through his own land for the benefit of those who may have acquired a prescriptive right to use the same.

Roads and bridges. Prescription. Ways. Before Judge UNDERWOOD. Walker Superior Court. February Term, 1874.

For the facts of this case, see the decision.

DABNEY & FOCHE, for plaintiff in error.

A. B. CULBERSON, for defendant.

WARNER, Chief Justice.

This case came before the court below on a *certiorari* from the decision of the commissioners of roads and revenue for the county of Walker. The court, after hearing the *certiorari* and the answer of the commissioners, dismissed it, and the plaintiff excepted. It appears from the record that in the year 1854, Puryear, the plaintiff in *certiorari*, had a private way established by an order of court for his individual use and benefit, partly on his own land and on the land of other persons; that the damages were regularly assessed for the injury done to the land of the other persons by the establishment of the private way, and paid for by him. Afterwards, Clements and Rosser, as the evidence shows, used the defendant's private way for more than seven years. It also appears, from the evidence in the record, that Puryear had recently put two gates across said private way, and had recently removed a causeway across a ditch, which he had previously put there for his own use, both of which were on his own land. It also appears from the evidence in the record, that one end of the causeway had fallen down so as to render it unsafe and dangerous to cross on it, and that Puryear had removed it to prevent injury to his stock and to persons crossing it, but had not prevented any one from passing around the ditch and causeway through his field, but had told Rosser and Clements when they passed along there to be certain and keep the old road. The commissioners ordered Puryear to remove the gates across the road and restore the causeway within forty-eight hours, and in default thereof, that the sheriff be ordered to do so.

1. The jurisdiction of the commissioners of Walker county over the subject matter was conferred by a special act of the general assembly. That the private way was originally established at the instance of Puryear for his own use and benefit, and paid for by him, there can be no doubt, and the question is, whether Rosser and Clements have the right to use that private way, as against the rights of Puryear. They claim

the right to do so by prescription, on the ground that they have used it for more than seven years. The 3235th section of the Code declares that the right of private way over another's land may arise from express grant, or from prescription, by seven years uninterrupted use through improved lands, or twenty years use over wild lands. The 737th section of the Code declares that whenever a private way has been in constant and uninterrupted use for seven years or more, and no legal steps have been taken to abolish the same, it shall not be lawful for any one to interfere with said private way. The private way in this case was not established at the instance or for the benefit of the plaintiffs, but at the instance of the defendant and for his benefit, and the plaintiffs claim the right to use the defendant's private way, as against him, by prescription. How, or in what manner, the plaintiffs have used the defendant's private way does not appear; whether they have used it on foot, or on horseback, or with carriages or wagons, or for what purpose, the evidence does not disclose. All that the evidence shows is, that it had been used by them for more than seven years. The evidence does not show that they have had the constant and *uninterrupted use* of the defendant's private way, for any purpose, for seven years, which is necessary to give them a prescriptive right to use it.

2. The defendant had the right to remove the causeway put across the ditch on his private way for his own benefit and convenience, when it became dangerous, to protect his stock from injury, as well as to protect himself from damages to other persons who might suffer injury in consequence of its dangerous and unsafe condition, provided that by so doing he did not interfere with the rights of others, and if the plaintiffs had shown that they had a good prescriptive right to use the defendant's private way by the constant and *uninterrupted use* thereof for seven years, still, they would not have had any prescriptive right to require the defendant to have restored the causeway across the ditch for their benefit. The defendant was not bound to keep his private way in order for the benefit

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of the plaintiffs at his own expense and trouble. If the plaintiffs had a good prescriptive right to use the defendant's private way, then the defendant would not have had the right to obstruct their use of it by the erection of gates thereon; but the obstruction of the private way by the erection of gates thereon is quite a different thing from removing a dangerous causeway, put there for his own convenience, when it was necessary for the protection of his own property and interest. All that can be said is, that the removal of the defendant's causeway might make it less convenient or more troublesome for the plaintiffs to use his private way, but if they have the prescriptive right to use it, then it is as much their duty to keep it in order for their own use and benefit as it would be for the defendant to do so, and, in our judgment, more so. The defendant is not bound to keep his private way in order for the use of the plaintiffs, and for their benefit. If the plaintiffs have a prescriptive right to use the defendant's private way, by proof of the constant and *uninterrupted use* thereof for seven years, then they would have the right to keep it in repair for their use, and the defendant would not have the right to prevent them from building a causeway across the ditch on the private way because it was on his land. The plaintiffs cannot require the defendant to rebuild the causeway for their benefit, nor can the defendant (if the plaintiffs have a prescriptive right to use the private way,) prevent the plaintiffs from rebuilding the causeway for their own benefit, if they should desire to do so, and when built, all parties having the right to use the private way would be entitled to do so. This is not a case in which the owner of land over which a private way has been established or used, is seeking to close it up, but it is a case in which the plaintiffs are claiming to use the private way of the defendant, established for his private use and benefit, and paid for by him; and, therefore, it is not within the provisions of the 731st and 732d sections of the Code. In our judgment, the court erred in dismissing the *certiorari* on the statement of facts disclosed in the record.

Let the judgment of the court below be reversed.

Porter *vs.* The State of Georgia.

JOSEPH F. PORTER, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

The jurisdiction of the superior courts of this state, to take cognizance of and to try and punish misdemeanors, is granted by the constitution. Such jurisdiction, however, is not exclusive, and it is competent for the general assembly to confer concurrent jurisdiction over such matters on city or county, or other courts, but the legislature is not authorized to deny jurisdiction to the superior courts altogether.

Constitutional law. Criminal law. Jurisdiction. Before Judge HOPKINS. Fulton Superior Court. April Term, 1874.

Porter was placed on trial for the offense of having, whilst a constable, received from a prisoner, then in arrest and under a warrant for retailing without license, \$25 00, said sum being paid in consideration of his releasing said prisoner and stopping the prosecution. The defendant pleaded that by act of the general assembly of the state of Georgia, approved February 25th, 1874, the superior court of Fulton county had no jurisdiction to try said case, because exclusive jurisdiction was thereby vested in the city court of Atlanta.

Upon demurrer, said plea was stricken, and the defendant excepted. The plea of not guilty was then filed, but the jury found to the contrary.

Error is assigned upon the above ground of exception.

W. F. WRIGHT, for plaintiff in error.

JOHN T. GLENN, solicitor general, for the state.

MCCAY, Judge.

Which of these two acts—the act giving to the city of Atlanta a new charter, or the act amending the act creating the city court—is to be considered as modifying the other, in matters in which the provisions are inconsistent, we do not, in terms, decide. The act last signed was first passed by the votes of the members of both houses, though it was not sent

to the governor, or signed by him, until after the other. See the journal of the senate of 1874.

The question is a new one, and not without difficulty, though by the very terms of our constitution, it would seem to be clear, whatever may be the rule in other states, that no act can be of force until it has either been sanctioned by the governor, or those other steps have been taken, provided for in the cases where he fails to sign, or vetoes a bill: Constitution of 1868. As, in our judgment, it is not competent for the legislature to deny to the superior court jurisdiction over misdemeanors, it is immaterial for the decision of the questions made by this record to settle which of these acts is to be treated as the last expression of the legislative will. If in respect to the jurisdiction of the superior court, the act of February 25th, 1874, is void, then there has been no legislative will expressed upon the subject at, least no such expression as is effective, and the date of it becomes immaterial. Our opinion is that the constitution itself, confers jurisdiction on the superior court to try misdemeanors and that whilst the legislature may confer the same jurisdiction upon other courts, it cannot deny the jurisdiction to the superior court. In the case of *Bell vs. The State*, 41 *Georgia*, 589, the question was whether, under the *laws* as they stood, the superior court had this jurisdiction, and in discussing it our attention was only called to the question whether it was competent for the superior court to try a misdemeanor—whether that competency was derived from the constitution alone or from the laws passed under it, was immaterial, and our purpose in the decision was mainly to show that under the *laws* the right to entertain jurisdiction was in the superior court. Whether the power could be found in the constitution without any legislative act, was not before us, and in the discussion of it we were not solicitous to decide that question. We did, however, by a reference to the peculiar language of the constitution, as compared with the words used in the constitutions of 1798, 1861 and 1865, and by other provisions of the constitution of 1868, as section 1 of article 5, and that clause of article XII, transferring to the superior court the cases,

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civil and criminal, pending in the county court, express some of the reasons controlling us in our present judgment. As, however, the present record brings up the question squarely, whether the jurisdiction of the superior courts of this state is granted by the constitution itself, without and above any legislative act, we have given to the whole subject our greatest consideration, and are driven by our convictions to say, that we think jurisdiction is granted by the constitution itself, and that it is not competent for the legislature to take it away.

We will not repeat what was said in 41 *Georgia*, 589, in reference to the slight difference in the words of the several constitutions. The difference between "exclusive jurisdiction in all criminal cases except misdemeanors," and "exclusive jurisdiction over felonies," is not a striking one, and though, without doubt, there is a difference, and by close analysis the difference *may* be made out very material, yet, taking the constitution altogether, and considering the history of the state, and of the superior court, we are clear that no difference was intended. The superior courts have ever in our history been the great reservoir of judicial power—the *aula regis*, as it were—in which the judicial powers of the state were vested, and however other courts might be erected as a relief to it, to take cognizance of minor matters, the practice has been uniform to retain in this tribunal concurrent, and generally, even supervisory power over them: 36 *Georgia*, 87; 9th *Ibid.*, 264. That a policy so persisted in for nearly a century, was intended to be abandoned, ought to be evidenced by plain words, and cannot fairly be deduced from a mere change in a form of expression. It is noticeable, too, in this connection, that the convention of 1868 abolished the county courts, which had this jurisdiction, and whilst, it provided for a district court as a mere experiment, to be abandoned at the will of the legislature, it was careful not to confer upon this district court *exclusive* jurisdiction over misdemeanors: Article 5, section 4. But we think the provisions of the 1st section of article 5th, and the 16th section of the same article, settles this question. The first section is as follows: "The

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judicial powers of this state shall be vested in a supreme court, superior courts, courts of ordinary, justices of the peace, and commissioned notaries public, and such other courts as have been or may be established by law." And section 16th is in these words: "All courts not specially mentioned by name in the first section of this article, may be abolished in any county, at the discretion of the general assembly, and the county courts now existing in Georgia, are hereby abolished." It follows from these two provisions that these several courts mentioned by name are the constitutional courts of the state. These courts are beyond legislative discretion. The legislature may create and abolish at its pleasure, but these tribunals have amongst them *all judicial power* by the very terms of the constitution itself. As to the superior court, certain powers are subsequently, in section 3, paragraph 2, declared to be exclusive in that tribunal. But it is plain that in the four tribunals mentioned in section first, the constitution vests, either exclusively, or concurrently with such other courts as have been or may be established by law, jurisdiction over every matter of a *judicial nature* that can arise.

The supreme court is, in terms, limited to be *only* a court of errors, and to have no original jurisdiction. And the courts of ordinary and justice courts have their *judicial powers* defined within special limits, by section 5, paragraph 1, and by section 6, paragraph 2. It may be added also that both the ordinaries and the justice of the peace have their constitutional powers granted to them personally—that is, without a jury—so that the conclusion is inevitable, that by the very words of the constitution, the superior court has vested in it all the judicial powers of the state not specially cast by the constitution upon either the supreme court, the ordinaries or the justices of the peace, and this is emphatically true of all judicial questions requiring a jury trial, since the constitutional jurisdiction to both the ordinary and to the justices of the peace is to them personally—"an ordinary"—"justices of the peace and commissioned notaries public."

That it is the exercise of judicial power to try a misde-

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meanor, and that the constitution contemplates (article 1, section 7) a jury, for such trial, is unquestionable. So that section 2, paragraph 2, of article 5, is rather to be looked on as specially intended, not to give the superior court jurisdiction at all, but to declare what portion of its jurisdiction is exclusive. It is noticeable, too, that out of the seven or eight specific enumerations in that paragraph, all but one are either of matters over which the superior court is declared to have exclusive jurisdiction, or are, by their nature, such matters as appeals, *certioraries* from inferior tribunals, etc., as are exclusive. The constitution of 1868 may therefore concisely be said—

1st. To vest all judicial power in the supreme court, superior courts, ordinaries and justices of the peace—commissioned notaries public, being, in fact, only another name for justices of the peace.

2d. To limit the jurisdiction of the supreme court, and fix the *constitutional* jurisdiction of the ordinaries and justices.

3d. To declare what matters are exclusively in the superior court.

4th. To leave all other questions of a judicial nature to the superior courts.

5th. Under the qualifications vesting exclusive jurisdiction in the superior courts, to declare it competent for the legislature to establish any other tribunals or abolish them at its discretion.

6th. As by section 16 of article 3, the general assembly cannot abolish any of the courts mentioned by name in the first section, it follows that in conferring jurisdiction upon any new tribunal it must take care not to *deny* to either of these “mentioned” their constitutional jurisdiction; that it *must* leave to them at least concurrent jurisdiction over the matters left to them by the constitution, since, as is self-evident, the legislature, if it cannot abolish a court, it cannot take away its jurisdiction either in gross or in detail, which is the same thing.

For these reasons we are of the opinion that the section of the act of February 25th, 1874, which makes it *the duty* of the judge of the superior court to transfer to the city court of At-

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lanta, for trial, all indictments for misdemeanors found by the grand jury in the superior court, is in violation of the constitution of 1868.

Judgment affirmed.

LIZZIE CLIFTON, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

(TRIPPE, Judge, was providentially prevented from presiding in this case.)

1. The general assembly has not the power, under the constitution, to deprive the superior courts of jurisdiction over misdemeanors.
2. Where no objection is made to evidence introduced upon the trial, it is too late to base a ground of new trial on account of alleged error in its admission.
3. The superior courts are not bound to take judicial cognizance of what had previously transpired before them, unless the records of such proceedings are exhibited as evidence.
4. There being sufficient evidence to sustain the verdict, it was not contrary to law.
5. To sustain an indictment for keeping a lewd house, it is only necessary to establish that the defendant contributed to and aided, directly or indirectly, in maintaining and keeping the same.
6. Where a juror failed to answer to his name when called, after the jury was stricken, but before the jurors were sworn or the case submitted, it was not error in the court to order the panel to be filled and the jury again stricken.
7. The defendant having gone to trial before that jury, without objection at the time, it was too late, even if the objection had been good, to insist upon it as a ground for a new trial.
8. The charge that the defendant maintained and kept a lewd house, was sufficient under the provisions of the Code, without alleging that it was a place for the practice of fornication or adultery.

Constitutional law. Criminal law. Jurisdiction. New trial. Evidence. Jury. Waiver. Before Judge HOPKINS. Fulton Superior Court. April Term, 1874.

This case is fully reported in the decision, with the exception of the plea of the defendant, which simply denied the jurisdiction of the superior court, on the ground that under

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the act of February 25th, 1874, the city court of Atlanta had exclusive jurisdiction of misdemeanors committed in the county of Fulton.

W. F. & H. WRIGHT, for plaintiff in error.

JOHN T. GLENN, solicitor general, by JACKSON & CLARKE, for the state.

WARNER, Chief Justice.

The defendant was indicted and charged with maintaining and keeping a lewd house in the county of Fulton. On the trial thereof, the jury found the defendant guilty. A motion was made for a new trial on the following grounds: First, because the court erred in sustaining the demurrer to the defendant's plea to the jurisdiction of the court. Second, because the court allowed the state to prove the reputation of the house of defendant, the reputation of defendant, and the reputation of the inmates of the house of defendant. Third, in not taking judicial notice of its own records as to what had transpired in court previous to the first of January 1874. Fourth, because the verdict of the jury was contrary to the evidence, and the weight of the evidence. Fifth, because the verdict was contrary to law. Sixth, because the court erred in charging the jury that the mere fact of renting the house would not make her guilty, but to look to the testimony and see if this defendant, by her conduct and her acts, contributed to, and aided in, keeping that as a lewd house; it matters not how directly or indirectly. Seventh, because after the jury had been stricken, Dowling, one of the jurors, not being in the court-room but within reach of the court, and being of the regular panel, the court dropped his name from the said panel, and ordered other talesmen added thereto, and discharged the other eleven jurors, ordered a new strike, and went to trial with the panel so last stricken. Eighth, because the court erred in not arresting the judgment in said case, on motion of defendant's counsel, on the ground that

the indictment failed fully to set out the offense as defined by the Code, in this, that the indictment did not allege that the defendant did maintain and keep a lewd house, for the practice of fornication, or adultery, or either. The motion for a new trial and the motion in arrest of judgment were both overruled, and the defendant excepted.

1. There was no error in sustaining the demurrer to the defendant's plea to the jurisdiction of the court, as was held in *Porter vs. The State*, during the present term.

2. There was no exception taken to the admissibility of the evidence as to the reputation of the house of defendant, or as to the reputation of defendant, or as to the reputation of the inmates of the house of defendant. So far as the record shows, that evidence was admitted without objection, and it was too late to raise that objection on a motion for a new trial.

3. The court was not bound to take judicial notice of its own records as to what had transpired in that court previous to the first of January 1874, unless, the records of such proceedings had been exhibited to the court as evidence of what had transpired there.

4. From the evidence contained in the record, if the jury believe the witnesses, there is sufficient evidence to sustain the verdict according to the repeated rulings of this court, and therefore the verdict was not contrary to law.

5. There was no error in the charge of the court as to the conduct, and acts of the defendant, in keeping the lewd house. The evidence showed that she lived there, and had been living in the house for some time, and if she contributed to and aided, directly or indirectly, in maintaining and keeping the lewd house, then she was guilty of the offense as alleged in the indictment.

6. There was no error in impanneling the jury according to the explanatory certificate of the presiding judge. The judge certifies that Dowling, the juror, did not answer when his name was called, and it did not appear that he was within the reach of the court. Before the jury was sworn or the case submitted, the court directed the panel to be filled and the jury

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stricken again; the only change made was to fill Dowling's place.

7. The defendant having gone to trial before that jury, without objection at the time, and taken her chance for an acquittal or conviction, it was too late, even if the objection would have been good, to insist upon it as a valid ground for a new trial.

8. There was no error in overruling the motion in arrest of judgment. The defendant was charged with maintaining and keeping a lewd house. The words "lewd house" import that it is a house given to the unlawful indulgence of lust, including fornication or adultery. A "lewd house" may properly be said to be a house in which fornication or adultery is practiced. Maintaining and keeping a lewd house is a distinct offense under the statute. So if a person shall maintain and keep any *other place*, as a booth or tent, for the practice of fornication or adultery, either by himself, herself, or others, such person would be guilty under the statute. The charge in the indictment that the defendant maintained and kept a lewd house, was sufficient under the provisions of the Code, without alleging that the lewd house was a place for the practice of fornication or adultery. The statute forbids any person, either by himself, herself, or others, to maintain and keep a lewd house *or place* for the practice of fornication or adultery. There was no error in overruling the motion for a new trial on the statement of facts disclosed by the record. This court does not grant new trials in criminal cases when there is sufficient evidence under the law to sustain the verdict, nor upon mere technical grounds not affecting the real merits of the case, or the substantial legal rights of the defendant; and the observance of this rule, by parties and their counsel, before bringing their cases here, would save much time and labor. The rulings of the court upon the question of granting new trials, have been so often repeated that the profession cannot be ignorant of them.

Let the judgment of the court below be affirmed.

ZADOCK C. BAKER *et al.*, plaintiffs in error, vs. THOMAS MCGUIRE, defendant in error.

(TRIPPE, Judge, was providentially prevented from presiding in this case.)

1. Where a proprietor of lands erects a mill upon his premises, and, by a dam, flows water over land above the mill, and he, dying, the land is sold in parcels to several persons, the vendee of the mill tract retains the right to keep up on his land a dam of equal height with that which was upon it at the time of his purchase, and to back the water according to the capacity of the dam.
2. When a mill-dam of a certain height exists, and with it, the right to back water upon land according to the capacity of the dam, and from want of repair, or leakage of the dam or other cause, the dam does not gather such a head of water as it might, and thus the back-water is usually less than the height of the dam would warrant, the owner of the mill has a right to build a new dam of the height of the old one, or to repair the old one, and if thus the extent of the back-water is increased, the owner of the mill is not liable for damages caused by the increased overflow.

Land. License. Riparian rights. Before Judge HOPKINS. DeKalb Superior Court. March Term, 1874.

Thomas McGuire brought case against Zadock C. Baker and Bradford Humphries for \$5,000 00 damages, sustained by reason of the backing of the water of "No Business" creek on certain lands of the plaintiff, situated in the counties of DeKalb and Gwinnett. The defendants pleaded the general issue, and set up title in themselves to a portion of the land alleged to have been injured.

The following brief statement of facts as presented by the testimony, is sufficient to an understanding of this case:

Forty-five or fifty years ago Zachrey Lee built a mill and dam upon property then owned by him. After his death, to-wit: in November, 1863, the tract of land upon which said dam was located was divided into parcels and sold by his executor. Zadock C. Baker bought that portion upon which the mill and dam were situated. Bradford Humphries was simply interested with Baker in the mill. The plaintiffs hold their land under the same sale. Baker built a new dam in July or August, 1871.

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There was evidence tending to show that since the erection of the new dam the back-water had been considerably increased, thus damaging the plaintiff. There was also testimony to the effect that this result was not due to the dam, but to other causes beyond the control of the defendants. The defendants and other witnesses, testified that the new dam was of the precise height of the old, and that if the back-water was thereby increased, it was due to the fact that the former was leaky, or out of repair, or for some other cause, did not accumulate the head of water which its height would justify; that the new dam would produce no greater effect upon the water than the old one, in proper condition, would have done.

The jury found for the plaintiff \$1,920 00. The defendants moved for a new trial upon the ground, that the damages were excessive, and because the court erred in charging the jury, "that the defendants had no right, by their dam, to back or make the water in the pond higher than was customary or ordinarily the case with the the old dam;" and in defining or explaining the efficient height of the dam to be, "the height at which it was capable, as ordinarily used, of raising the water."

The court ordered a new trial unless the plaintiff would write off from their verdict \$1,620 00. This was done, and the defendants excepted.

GARTRELL & STEPHENS; HILLYER & BROTHER, for the plaintiffs in error.

M. A. CANDLER, for defendant.

McCAY, Judge.

1. We do not go into the evidence in this case. The judge below was, himself, satisfied that the verdict was excessive, and has put the plaintiff below upon terms. We find some difficulty, it is true, in discovering what rule the judge adopted in finding how much ought to stand and how much ought to be written off. We cannot, however, refrain from saying

that, as the facts appear in the record, it is impossible to agree with the opinion of the witnesses that the dam caused the overflow above the riffles and running water, and almost all the witnesses say, there was running water and riffles below the overflow in the upper field. How a dam can back water *beyond* and above a current, we do not see, unless the water is governed by some laws peculiar to "No Business" creek.

2. But our judgment of reversal is upon what, in our opinion, was an error in the charge of the court. This mill, and a dam to raise the water to run it, was built by old Mr. Lee, the original proprietor of the land owned by both parties. At his death it was sold at administrator's sale, in two parcels, on the same day. The rule is well settled that the vendee of the mill tract got all the easement of the mill and dam, got the right to flow water, as the dam was capable of flowing it, and that the adjoining land went to the purchaser of it with that servitude upon it: See Washburn on Easements, 43, 60, where this whole doctrine is discussed. The rule seems equally well settled that the capacity of the dam from its height is the measure of the easement. Sometimes a new dam leaks greatly, sometimes a dam gets out of repair and leaks, sometimes the use of the water, by night and by day, or with a peculiar wheel, keeps the water at a low ebb; and these failures to use a dam to its full height continue for years. But the doctrine seems to be well settled, that the right of the mill owner is not lost by the leakiness of his dam, or by the steady and constant use of the water. He has a right to repair his dam or build a better, though not a higher one. He has a right, too, by the use of better wheels, or by doing less work, to save his water, and if in either of these ways the water in the dam is kept at a higher point, and the back-water is carried higher up the stream, he is still only using the easement he bought and of which the other vendees had full notice, by the height of the dam: *Conell vs. Thayer*, 5 Metcalf, 253, 258; *Alder vs. Savill*, 5 Taunton, 451; *Lacy vs. Arnett*, 33 Penn., 169; 20 N. Y., 354. And we think this a fair and reasonable rule, one tending to eu-

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courage improvement, and one doing no harm, as the height of the dam and its efficiency, are matters the other vendees might easily know and take into consideration on their purchase. Under the charge of the court, the plaintiff in error was confined to the flow of water, as it usually flowed, though there was testimony that the old dam leaked badly, and that the new dam was no *higher* than the old one. It seems to us absurd to say that the purchaser of the mill tract, had no right to repair the dam, however long it might have been out of order, and that he was driven to build a new dam of the same inefficiency. We think, under the evidence, the jury might have found differently, had what we take to be the true rule on this subject, been submitted to them, and for this reason we reverse the judgment.

Judgment reversed.

ISAAC MIDDLETON, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

To take and carry away a bale of cotton from in front of a warehouse where valuable goods were stored, with intent to steal the same, does not constitute the offense of larceny from the house. The evidence must show that the property alleged to have been stolen was in some house and that it was taken by the defendant therefrom.

Criminal law. Larceny. Before Judge SCHLEY. Chat-ham Superior Court. November Special Term, 1873.

For the facts of this case, see the decision.

PHILIP M. & R. WAYNE RUSSELL, by HENRY B. TOMPKINS, for plaintiff in error.

ALBERT R. LAMAR, solicitor general, by R. H. CLARK, for the state.

WARNER, Chief Justice.

The defendant was indicted for the offense of "larceny from the house," and on the trial thereof the jury, under the charge

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of the court, found the defendant guilty. A motion was made for a new trial on the ground of error in the charge of the court to the jury, and because the verdict was contrary to law and the evidence, which motion was overruled and the defendant excepted. The defendant is charged in the indictment with having taken and carried away from the warehouse of the prosecutor one bale of cotton, the said warehouse being a place where valuable goods were stored, with intent to steal the same. The evidence in the record shows that the bale of cotton was not *in* the warehouse, but *outside* of it, in an alley way. The court charged the jury "that if they found from the evidence that the bale of cotton was in front of the warehouse and under its control and protection, it would be the same criminally as if within its walls, and would be a taking from, upon the same basis as if a storekeeper places goods in front of his store, and a thief take them therefrom, it would be larceny from the house." The 413th section of the Code defines larceny from the house to be the breaking or entering any house with intent to steal, or after breaking or entering said house, stealing *therefrom* any money, goods, clothes, wares, merchandise, or any thing or things of value whatever. The 414th section defines the penalty for stealing *in* any of the houses described in that section. Simple theft or larceny is the wrongful and fraudulent taking and carrying away by any person, of the personal goods of another, with intent to steal the same: Code 4393. The distinction between simple larceny and larceny from the house will be readily perceived. The evidence in the record before us does not show that the defendant was guilty of the offense of larceny from the house, inasmuch as it does not show that the cotton alleged to have been stolen was *in* any house, or that it was taken by the defendant *therefrom*. The charge of the court, in view of the evidence contained in the record, was error.

Let the judgment of the court below be reversed.

Coughlin *et al.* vs. Seago.

JOHN COUGHLIN *et al.*, plaintiffs in error, vs. ALVIN K. SEAGO, defendant in error.

A trust to a man for the sole use of his wife, determines at the death of the husband. The wife then becomes *ipso facto* the legal owner of the estate, and she being a *feme sole*, a judgment against her binds it, so that a purchaser at sheriff's sale of the property under such judgment, gets a good legal title.

Trusts. Husband and wife. Judgment. Before DENNIS F. HAMMOND, Esq., Judge *pro hac vice*. Fulton Superior Court. April Term, 1874.

Coughlin, in his own right, and as next friend for his minor children, brought complaint against Seago for two lots of land in the city of Atlanta. The record fails to disclose any plea. The evidence made this case:

On September 23d, 1862, one Edwin Payne conveyed the premises in dispute to "John Withers, as trustee for his wife, Mary Withers, free from the debts or alienation of him, and for her sole and separate use." The deed further recited that said John Withers was to hold said property "to the only proper use, benefit and behoof of her, the said Mary Withers, her heirs, executors, administrators and assigns, in fee simple." John Withers, the trustee, died in 1864. Mary Withers, the *cestui que trust*, died in December, 1867, leaving Selina Coughlin, the late wife of the plaintiff, and Walter S. Withers, as her only heirs-at-law. On October 24th, 1867, one Rush Pratt recovered a judgment against said Mary Withers and Walter S. Withers, and had the execution based thereon, levied on the property aforesaid. At the sale under said levy it was purchased by John R. Wallace, who subsequently conveyed the same to the defendant.

The court charged the jury as follows: "By the terms of said deed (from Payne to John Withers, as trustee) the trust determined on the death of John Withers, the husband and trustee, and the property described therein was thenceforth subject to the debts of Mary Withers by a general or common

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law judgment, and if they believed such a judgment had been obtained, and the property had been regularly sold under it, and defendant held title under said sale, it legally passed the title out of Mary Withers and her heirs, notwithstanding the terms of said deed from Edwin Payne."

The jury found for the defendant. The plaintiff assigns the charge aforesaid as error.

GARTRELL & STEPHENS; RICHARD H. CLARK, for plaintiffs in error.

COLLIER, MYNATT & COLLIER; THRASHER & THRASHER, for defendant.

McCAY, Judge.

The existence of a trust, without any necessity for such an exception to the ordinary legal title to property, has always, since the statute of uses, been contrary to the policy of the law. It is to the public interest that if one have the entire beneficial interest in property and be fully *sui juris*, under no disability, the law should, in all respects, treat the title as a legal one; and the rule is uniform that when the purposes of a trust have ceased and the beneficiaries are of full age and free from disability, the estate shall, by operation of law, become a legal estate: Code, sections 2313, 2314. The object of this trust deed was, upon the face of it, solely to protect the property against the marital rights of the husband, and preserve it for the use of the wife during the coverture. At the death of the husband the whole purpose of the trust was at an end. Had the wife, under the old law, married again, her second husband would have taken the property in fee. It follows, therefore, that the wife was as completely the legal owner of this property when she became a widow as though she had then first got it by a purchase of it, and any judgment obtained against her bound it as it would any other property to which she had a legal title. There was no necessity to procure a judgment as prescribed in section 3378 of the Code

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for subjecting trust property to debts. It was not trust property at all. The title was a legal one and passed, and was bound as any other legal title would pass or be bound. We think, therefore, that the charge of the court was right, and the verdict right.

Judgment affirmed.

JOSEPH SPEARS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. The verdict of the jury is supported by the evidence.
2. The entire charge not being in the record, and therefore presumed to have been correct as applicable to the facts, a new trial will not be ordered because the court refused to charge "that the fact that the goods alleged to have been taken from the house of the prosecutor, were found in the possession of the defendant, was not *conclusive* proof that the defendant was guilty of burglary."

Criminal law. Burglary. New trial. Before Judge BARTLETT. Jasper Superior Court. February Adjourned Term, 1874.

For the facts of this case, see the decision.

C. L. BARTLETT, for plaintiff in error.

J. W. PRESTON, solicitor general, by JACKSON & CLARKE, for the state.

WARNER, Chief Justice.

The defendant was indicted for the offense of burglary. On the trial of the case the jury found the defendant guilty. A motion was made for a new trial on the ground that the verdict was contrary to the evidence, and without any evidence to support it, and because the court refused to charge the jury as requested, "that the fact that the goods alleged to have been taken from the house of the prosecutor were found

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in the possession of the defendant, is not conclusive proof that the defendant is guilty of burglary."

1. In looking through the evidence contained in the record, it is quite sufficient to sustain the verdict, in our judgment, if the jury believed the witnesses, and according to the numerous and repeated rulings of this court, we will not interfere with the verdict on that ground, the more especially as the court below before which the trial was had, has refused to do so.

2. The charge of the court to the jury is not in the record, and is not excepted to; the legal presumption, therefore, is, that the court charged the law correctly as applicable to the facts of the case, and its refusal to charge as requested, in relation to the possession of the goods by the defendant not being *conclusive* proof of the defendant's guilt, was not error.

Let the judgment of the court below be affirmed.

JACK MCDANIEL, plaintiff in error, vs. THE STATE OF
GEORGIA, defendant in error.

1. It is not competent for a party to discredit one of his own witnesses, unless it is shown to the court that he was entrapped to introduce the witness by statements made by him contradictory to those he has now testified to.
2. The evidence in this case consisting as it does *wholly* of facts going to show that certain foot-tracks found leading from fodder stacks resembled the tracks usually made by prisoner, without any evidence that the tracks found were recent, and that the prisoner had an unusual or peculiar track, and other evidence to aid the opinion of the witnesses, does not justify the verdict.

Criminal law. Witness. Evidence. Before Judge STROZER. Dougherty Superior Court. April Term, 1874.

Jack McDaniel was placed on trial for the offense of malicious mischief, alleged to have been committed on November 13th, 1873, in burning a stack of fodder, the property of S. H. Wilson. The defendant pleaded not guilty.

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The evidence for the state was purely circumstantial. It showed that there had been "some unpleasantness" between the defendant and Wilson; that the tracks leading from the fodder stack went to the defendant's house; that they resembled those usually made by him in measurement and general appearance; that defendant's boots had metal and brads on the heels, the impression of which was left upon the tracks.

The evidence for the defendant made a strong case of *alibi*.

The jury found the defendant guilty. A motion was made for a new trial because the verdict was contrary to the law and the evidence, and because the court erred in allowing the state to impeach one of her witnesses without having previously shown that the prosecution was entrapped to introduce such witness by statements made by him contradictory to those testified to.

The motion was overruled and the defendant excepted.

H. MORGAN; B. J. ODOM, by R. H. CLARK, for plaintiff in error.

B. B. BOWER, solicitor general, for the state.

McCAY, Judge.

1. The Code, section 3869, declares that a party shall not be permitted to discredit his own witness, unless he first shows to the court that he has been entrapped by previous contradictory statements made by the witness. It is not sufficient that he shall have made contradictory statements; such statements must have deceived, and led the party complaining to introduce him, and thus, unwittingly, to have been damaged by statements different from what he expected. Under such circumstances, the law permits a party to violate that salutary rule which assumes that one who brings a witness before a court, has, at least, confidence in his truthfulness. In this case no effort was made to show to the court an entrapping; it does not even appear that the solicitor general knew what he had stated, or that he had ever talked with the witness, much

less, that he had put him up as a witness by virtue of any false impression.

2. Under the evidence in the record, we do not think there was enough evidence to justify a verdict of guilty. When closely looked to, there is, at last, nothing but the opinions of certain witnesses that the foot-tracks were the prisoner's tracks, and those opinions came from witnesses, who, however honest they may be, are avowedly prejudiced against the prisoner, and frankly announce that they not only think him guilty, but they intend to convict him if they can. The evidence of a comparison of the tracks found, with the track made by the prisoner, is not direct. One witness measured the tracks going from the stacks; another measured the prisoner's track as he saw him make it. The two met in town, and compared the sticks, and they testify to the result. We doubt if this be even legal evidence. The witness in each case gives his opinion based on the measurement of the other. The two measurements ought to have been before the jury, for them to decide. Nor does it appear that the tracks at the fodder were recent; they may have been made the day before or the night before. The stacks were not far from prisoner's house, and for forty-eight hours before he might have had various motives for going to them with no evil intent. The evidence as to the conduct of the prisoner, in driving his team into the woods and dodging about in the fence corners, we are unable to see the application of. Nothing appears as to the time it took place. It could not have been at the time or just before the fire, since the witness was at work picking cotton. Perhaps there is some defect in the record, but as it stands, we can see nothing in this evidence of the prisoner driving his team into the woods and his dodging along the fence, at all relevant to the issue. We are loath to interfere with the verdict of a jury, but the evidence here is inconclusive, uncertain, and so entirely a matter of opinion, that we think it would be a dangerous precedent to let it stand, especially in so serious a matter as a felony.

Judgment reversed.

Cooper *vs.* The State of Georgia.

JIM COOPER, plaintiff in error, *vs.* THE STATE OF GEORGIA,
defendant in error.

Where it is doubtful from all the facts and circumstances disclosed by the record whether the defendant was guilty of murder, this court will give him the benefit of that doubt and order a new trial, especially where the judge of the superior court stated, in sentencing him for the offense of murder, that he did so reluctantly.

New trial. Before Judge GIBSON. Richmond Superior Court. October Term, 1873.

For the facts, see the decision.

S. F. WEBB; H. A. DUNCAN, for plaintiff in error.

DAVENPORT JACKSON, solicitor general, by JACKSON & CLARKE, for the state.

WARNER, Chief Justice.

The defendant was indicted for the offense of murder, and on the trial thereof was found guilty, and sentenced to be executed. A motion was made for a new trial, which was overruled by the court, and the defendant excepted. In looking through the evidence in the record, we are not satisfied that it makes out a clear case of murder under the law. And inasmuch as that is a doubtful question from all the facts and circumstances as disclosed by the record, we give the defendant the benefit of the doubt, and grant him a new trial, and the more especially do we do so in this case, because it appears from the record that the presiding judge before whom the trial was had, stated in sentencing the defendant for the offense of murder that he did so *reluctantly*.

Let the judgment of the court below be reversed.

GEORGE J. MURRAY, plaintiff in error, *vs.* HOLMES SELLS,
for use, defendant in error.

1. Where a homestead was laid off under the act of 1868, to A, as the head of a family consisting of his wife and child, and the husband and wife sold the homestead, and invested the proceeds in other real estate, intending that the property in which the money was invested should take the place of and be in lieu of the homestead, but by mistake the deed was made to the wife only as a free trader, and she having become a bankrupt, the property was sold in bankruptcy to a purchaser who had full notice of all the facts:

Held, that equity will treat the title to the wife as a trust for the same uses as was the homestead under the law, and will treat the purchaser with notice, as holding for the same use as she did.

2. In this state, in an action at law, under the statutory form, by the husband, the plaintiff may amend his action, setting forth such mistake, and, on proper proof, treat the deed to his wife as it was in fact intended.
3. Although, as a general rule, equity will only correct a simple mistake when it is mutual, yet when the actual grantor in a deed is merely a nominal party who has parted with his interest to other third persons, and the contract is in fact between them, and the mistake is mutual between the parties at interest, equity, which looks only to the substance of the transaction, will correct a mistake, mutual as to the several parties, though the nominal actor has made no mistake, but merely did as he was directed.
4. It is the duty of a judge in his charge to the jury, to give the law substantially as it exists on the facts of a case as they appear in the evidence; but it is not error in him to fail to give a particular principle of law in charge, if the evidence does not present a case fully meeting the principle of law insisted on.
5. That one has been guilty of a fraud as to a particular parcel of land in his dealings with one person, so that, as to this person, he is estopped, does not estop him as to another person who is not a privy in estate with the first.
6. In this case the evidence being conflicting, and the judge having fairly submitted it to the jury under the evidence and the law arising upon it, we do not feel that the verdict is such as justifies the interference of this court.

Ejectment. Homestead. Trust. Mistake. Amendment.
Equity. Charge of Court. Estoppel. New trial. Before
RICHARD H. CLARK, Esq., Judge *pro hac vice*. Fulton Superior Court. October Term, 1873.

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Holmes Sells, for the use of his wife, Amy H. Sells, and minor child, John D. Sells, brought complaint against Wiley O'Shields, tenant in possession, for the recovery of a tract of land lying in the city of Atlanta, known as that portion of the A. J. Orme subdivision of block number one hundred and forty-six, in the original land lot number fifty-one, in the fourteenth district of originally Henry, now Fulton county, fronting on east Harris street, one hundred and eighty-three feet, and running back on Butler street, two hundred and two feet. George J. Murray, the real party at interest, was, by order of court, made the defendant.

At the trial term the plaintiff proposed to amend his declaration as follows:

Plaintiff shows that in the year 1868, he applied to the ordinary of said county for an exemption of personalty and a homestead of realty, under the constitution and laws of said state, for the use and benefit of said Amy H. and John D. Sells, and, after due notice, said ordinary allotted to him for such exemption, a steam saw-mill in DeKalb county, Georgia, and on the 2d of April, 1869, he set apart to him for such homestead, a lot of land in the said city of Atlanta, on the corner of Oak and Ivy streets. Plaintiff and his wife, on the 19th day of April, 1870, sold and conveyed said homestead land for the sum of \$1,711 00; and for the purpose of investing a part of the money thus realized, he purchased of Rondeau & Company, in the fall of the year, the lot of land first above described, for which he agreed to pay, and did pay the sum of \$1,000 00; in consideration of the same, well knowing that said land was being bought for the purpose of said investment, they promised and agreed to sell for the use of Amy H. and John D. Sells. Rondeau & Company purchased said land of A. J. Orme, and held his bond for titles to make them a deed on receiving the purchase money therefor, a portion of which was then unpaid; which being fully paid off and discharged, they further promised to procure for plaintiff from said Orme the necessary and proper

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deed. In pursuance of said agreement, with plaintiff's consent, he authorized and employed William A. Rondeau, one of the said firm, a man in whom he had the utmost confidence, to see Orme and obtain from him such deed, but no instructions were given to him in regard to the form of execution of said deed or the parties thereto, though being one of the contracting parties, and cognizant of all the facts, he was expected by all of said parties to obtain from said Orme a deed in conformity to the said contract, conveying said land to the plaintiff for the use and benefit of his family, the said Amy H. and John D. Sells. Said Rondeau undertook to procure said deed, but in betrayal of such confidence of trust, or through fraud, mistake, ignorance, inadvertence or misapprehension, he obtained from said Orme the deed made and executed to Amy H. Sells on the 2d day of January, 1871, conveying said land to her as a free trader.

Rondeau & Company, in full satisfaction of said parol contract for the sale of said land, on the receipt of said deed, delivered the same to plaintiff, as the proper deed under the contract, and without an examination of the same—believing, in good faith, that it was all right, and in accordance with said contract—he received the said deed, and was put in possession of the land by them under the same, for the use and benefit of the said Amy H. and John D. Sells. Plaintiff, on receiving said deed and taking possession of said land thereunder, presented the same to the ordinary of said county for his approval of said purchase and investment, and on the 18th day of February, 1871, he indorsed his approval and confirmation of the same on the back of said deed, and plaintiff had said deed, and the said indorsement thereon, recorded in the clerk's office of the superior court.

Rondeau & Company had no desire or intention of having said deed made to Amy H. Sells, as a free trader, and in procuring such deed, said Rondeau acted without any authority or power, in the absence of any contract justifying his conduct, and violated the trust and confidence place in him as aforesaid; and if said deed is allowed to stand in its present absolute

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form, it will operate as a fraud and great wrong on the rights of the plaintiff and his family.

In making said purchase and procuring said deed, no legal advice was obtained, and all of said parties were unskilled in the law, its technicalities and forms of conveyance.

Plaintiff therefore shows that in the execution of said deed a mistake was made, as hereinbefore set forth, and the same consists in the fact, as stated, that by said deed said land is conveyed to said Amy H. Sells, as a free-trader; whereas, had it been drafted in conformity with the contract under which the same was made and executed, and in accordance with the intention of the parties, said land would have been thereby conveyed to the plaintiff for the use and benefit of the said Amy H. Sells and John D. Sells; owing to said mistake or error, said deed does not speak the intention of said parties who made the contract by virtue of which said deed was made and executed.

Orme was not a party to the contract made between plaintiff and said Rondeau & Company for the purchase and sale of said land; and he having received all the purchase money due him, was wholly indifferent as to the entire transaction, and stood ready and willing to convey said land to whomsoever, and in such manner, as said Rondeau & Company might designate; and when said Rondeau requested said Orme to make said deed to Amy H. Sells, (if, indeed, he made any such request,) he honestly believed that such a deed was sufficient under said contract to secure said property for the use of plaintiff's said family.

On the 21st day of March, 1871, Rondeau & Company were forced into bankruptcy by one of their creditors, and William R. Hammond, Esq., was appointed their assignee by the register in bankruptcy; and said assignee, on the 3d of July, 1871, sold said land first above described, subject to all incumbrances, and at said sale the defendant bid off the same at and for the sum of \$2,500 00, and having purchased said land in full recognition of plaintiff's right thereto as aforesaid, after the same had been passed on and recognized by the

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United States district court of Georgia, he respectfully submits that he is now estopped from denying plaintiff's title to said land. Plaintiff was present at said sale, and through his attorney, Mr. Tigner, forbid the same, and then and there, in like manner, gave notice to said defendant, who was present, and all others then present, that said land and improvements thereon were the property of plaintiff for the use of his wife, Amy H. Sells, and his minor child, John D. Sells; that plaintiff's said homestead money paid for the same. He fully informed all persons then and there present, including the defendant, that in the execution of said deed a mistake was made, as hereinbefore set forth; that the ordinary of said county had approved on said deed said purchase as aforesaid, and that said deed was recorded with said order of approval as aforesaid, and that said deed was in his custody, and said land in his possession thereunder.

Notwithstanding this notice, said defendant bid off said land, as stated; and though he purchased the same subject to all incumbrances thereon, yet, disregarding the right and title of plaintiff, he immediately thereafter unlawfully seized and took possession of said land and the improvements thereon, and now refuses to deliver the same to him, or pay him the profits thereof.

Plaintiff further shows, that in 1870 he and his wife sold said exemption of personalty for one hundred and ten thousand feet of lumber, and after selling a portion of it for \$300 00, which sum of money was used by plaintiff towards the payment of said purchase money, the remainder of said lumber was used in erecting buildings on said land and otherwise improving the same.

He hereby offers to do and perform whatever he ought to do and perform towards the rectification of said mistake in said deed, or in the establishment of his right and title to said land for the use and benefit of his family.

He therefore prays that on the final hearing of this cause, the court sitting in equity, may find and decree that said deed made by A. J. Orme to Amy H. Sells, a free trader, was

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made and executed under and by virtue of said parol contract between plaintiff and said Rondeau & Company, and that the purchase money of said land was paid by plaintiff out of moneys in his hands for the use and benefit of his said wife and child, and realized by the sale of said homestead and exemption property, and that it was the intention and purpose of all the parties that said land should be conveyed by said Orme to the plaintiff for the use and benefit of the said Amy H. and John D. Sells.

That the court may further find and decree that in the execution of said deed, a mistake was made by the contracting parties, and that through such mistake, ignorance, inadvertence or misapprehension of said parties, or of said agents, or the fraud of said Rondeau & Company or said agents, said Orme was caused to make said deed to said Amy H. Sells, a free trader, and that on account of said mistake, said deed does not speak or set forth the intention of said contracting parties, and that it was the real and true intention of said parties that said land should be conveyed by said Orme to plaintiff for the use and benefit of his wife, Amy H. Sells, and John D. Sells, their minor child.

That said deed may be reformed or corrected accordingly, and made to convey the legal title to said land to the plaintiff for the use and benefit of his said wife and child.

But should the court be of opinion that the mistake in said deed cannot be corrected and the same reformed to speak the truth, and to convey to plaintiff said land for the use of his family as aforesaid, then he prays that the court may decree that said land was bought by him from said Rondeau & Company for the use and benefit of said family, and that the purchase money was paid to Rondeau & Company by the plaintiff, with money in his hands, as trustee for said Amy H. and John D. Sells, and realized by a sale of said homestead and exemption property as aforesaid, and that a resulting or implied trust in his favor and for their use, may be set up and established in said land; that said defendant may be decreed to hold the legal title of said land for the use of said Amy

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H. and John D. Sells, and that he may be required, by order of this court, to convey said land under his hand and seal to the plaintiff, as trustee for the said Amy H. and John D Sells, for their sole use and benefit ; that the title to said land, if in defendant, may be divested and vested in plaintiff.

Plaintiff further prays that he and his said family may be put in possession of said land, and that a decree be entered in his favor for their use against said defendant for the amount of the profits of said land since the 3d of July, 1871. Plaintiff waives all discovery.

The amendment was objected to. The objection was overruled and defendant excepted.

A demurrer to the same was then filed so far as it attempted to set up and correct a mistake in the deed therein specified. The demurrer was overruled and defendant excepted.

All the evidence necessary to an understanding of the case is embraced in the charge of the court. The following verdict was returned:

"We, the jury, find in favor of the plaintiff an error in the deed, and give the plaintiff the house and lot without rents or interest, and that deed be vested in the plaintiff for the use of his family."

The defendant moved for a new trial on the following grounds:

1st. Because the verdict was contrary to the following charge: "This is a suit brought by Holmes Sells for the use of his wife and child, against the defendant, to recover a certain city lot, on the ground that it was purchased as a homestead with money arising from the sale of a homestead set apart according to the laws of this state; that the deed for the property in question should have been taken so as to express said homestead right, but by mistake, or violation of duty of the agent, Rondeau, to so make the purchase, the deed was made to Mrs. Amy H. Sells in her capacity of free trader. Plaintiff prays on this ground a reformation of the deed, so as to speak what they allege as the true intent of the parties, and that they may recover the property. I charge you that the pleadings

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and the parties do not make a case for the reformation of the deed, because the maker of the deed, Orme, is not party defendant, and you can make no decree to affect him. But if you believe, from the evidence, that there was a homestead set apart legally to Holmes Sells as the head of a family; that this homestead was permitted to be sold by the ordinary; that it was sold and the purchase money was reinvested in the premises in dispute, and that the taking of the deed to Amy H. Sells, as free trader, was by mistake of the agent to so take the deed, or that he violated his trust in so taking it, you may find that the legal effect of that deed is to pass the title from Orme to Holmes Sells and family as a homestead, and that the plaintiff is entitled to recover the premises in dispute, it being a rule of equity that trust funds may be followed into whatever property they may be traced, and the property recovered. It is not necessary that it should be the identical money or bills, but the proof should satisfy your minds that the money realized from plaintiff's homestead is now in the property in dispute. If you are satisfied of this fact from the proof, and there is no reason shown by the defendant why his equity is not paramount to this, it will be your duty to find for the plaintiff in the manner I have prescribed. It all depends upon the truth and good faith of the plaintiff's case, of which you are the sole judges under the rules of law given you in charge. In order to arrive at a proper conclusion, you are to weigh all the circumstances against this theory, as well as those in its favor. One circumstance is the mortgage which it is alleged, and upon which proof has been offered, that Mrs. Sells made to Kyle of the same property, in her capacity as free trader. If you believe she did make such a mortgage, it is a circumstance which goes to illustrate the truth or falsity of the plaintiff's case; and if that circumstance satisfies your minds that the plaintiff's claim is untrue and not founded in good faith—that it is so inconsistent with the facts they set up to entitle them to recovery, that both cannot be true—it will be your duty to find for the defendant. There is also another circumstance of like

character in the proof admitted to the point, that within a short time after the mortgage to Kyle, Mrs. Sells, as a member of the firm of Rondeau & Company, drew out of the firm an amount of money sufficiently large, or nearly so, to represent said homestead fund. If you believe that this circumstance, like the others, goes to prove and does prove to your satisfaction, that this purchasing of the property was as a homestead, but by mistake or the acts of a faithless agent, the deed was not taken in that right, has no foundation, or insufficient foundation in truth, it will be your duty to find for the defendant. This circumstance has also another bearing upon this case, and that is: if the facts were in all material matters as alleged by plaintiff, but notwithstanding the mortgage alluded to was made to Kyle in accordance with the right expressed in the deed, and then Mrs. Sells drew out of Rondeau & Company, from the money obtained from Kyle, an amount in representation of the homestead, then it would be your duty to find for the defendant, on the ground that this destroys the entire basis of plaintiff's case; for in that case the homestead fund could not be in this property. But on this point, if you believe from the evidence that the amount so received from Rondeau & Company was on another account, or from another source, you would be authorized to conclude that that money was not the proceeds of the homestead. Defendant asks me to charge in writing as follows: 'If you believe, from the evidence in this case, that the plaintiff was guilty of fraud in having the deed made as it was to Mrs. Sells, as a free trader, and that she practiced a fraud upon J. C. Kyle in mortgaging this property to him in that character, and received a benefit thereby by getting a portion of the money raised upon such mortgage, she cannot take advantage of her own wrong and recover in this case.' I cannot give the charge in the language couched, because Kyle, to whom the mortgage was made, is not a party to this proceeding; but I do charge you, as heretofore, that this is a circumstance from which you may conclude that plaintiff's case has no foundation in truth or good faith. If you believe that defendant

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purchased at an assignee's sale, upon a judgment which sold this property subject to this incumbrance, or that at the sale notice was given of this claim, so that the purchaser must have known it, that sale is no bar to plaintiff's recovery, if, in all material matters, as charged, they have proven their right to you, their legal right. I charge you that you need not consider the evidence as to the personalty exempted, and its having been added to or expended upon this property. If a homestead is made out, whatever is put upon it follows that title. If personalty exemption and homestead have been blended, that concerns the creditors of Holmes Sells, who have their remedy, and not this defendant. This, gentlemen, is a case for your consideration alone, upon applying the law as I have given it in charge, to the facts. Upon the latter you are supreme. If, as instructed, you find for the plaintiff, you will frame your verdict so as to express that the deed from Orme to Amy H. Sells, free trader, shall have the legal effect to put the title in this property in Holmes Sells, the head of his family, as a homestead under the laws of Georgia, and that the plaintiff recover the premises in dispute, with such rents or *mesne* profits as the evidence satisfies your minds they are entitled to, from the time defendant took possession until now. If the plaintiffs have not established their case to your satisfaction, under the proof and the law as given you in charge, you will say, 'we find for defendant.'"

2d. Because the court erred in charging as follows: "If you believe, from the evidence, that there was a homestead set apart to Holmes Sells, legally, as the head of a family; that this homestead was permitted to be sold by the ordinary; that it was sold, and the purchase money was reinvested in the premises in dispute, and that the taking of the deed to Amy H. Sells, as a free trader, was by mistake of the agent to so take the deed, or that he violated his trust in so doing it, you may find that the legal effect of that deed is to pass the title from Orme to Holmes Sells and family, as a homestead, and that the plaintiffs are entitled to recover the premises in dispute, it being a rule of equity that trust funds

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may be followed into whatever property they may be traced, and the property recovered."

3d. Because the court erred in charging the jury "that if they believed from the evidence that the money received by Mrs. Sells from Rondeau & Company, if any was received after the mortgage of the premises in dispute to Kyle, *was on another account* than the homestead account, they would be authorized to conclude that that money was not the proceeds of the homestead."

4th. Because the court erred in refusing to charge as requested by defendant's counsel, as set forth in the charge of the court in the third ground in this motion.

5th. Because the court erred in charging as follows: "You need not consider the evidence as to the personalty exempted, and its having been added to, or expended upon, this property. If a homestead is made out, whatever is put upon it follows that title. If personalty exemption and homestead have been blended, that concerns the creditors of Holmes Sells, who have their remedy, and not this defendant."

The motion was overruled and defendant excepted. Error is assigned upon each of the aforesaid grounds of exception.

D. F. & W. R. HAMMOND; B. H. HILL & SON, for plaintiff in error.

MARGENIUS A. BELL; W. A. TIGNER; A. W. HAMMOND & SON, for defendant.

McCAY, Judge.

1. If the truth of this case is as claimed by the defendant in error; if honestly and fairly, his homestead was laid off out of his own property, and it was sold and the proceeds disposed of as he claims, and with the object and intent he claims, and by reason of the mistake of his agent, the formal title was made to Mrs. Sells, and the plaintiff in error bought it with full notice of the facts, it is eminently just that Sells, who had no part in the firm of Rondeau & Company, and who,

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by this mistake, would lose his land, should be protected, especially against the plaintiff in error, who acted with his eyes open and at his own risk. Why should Sells' land go to pay Rondeau & Company's debts? What equities should arise in favor of Murray who was fully notified that this land was not Mrs. Sells,' and who purchased it, speculating upon his chances of showing that the land was hers, notwithstanding the notice to him? Very probably he felt quite certain the claim of Sells was untrue, and that he, Murray, would succeed in establishing that view of it. He has failed in doing that to the satisfaction of a jury, and must take the consequences. The jury having found the facts for the plaintiff below, we are to treat them in our inquiries as to the law arising thereon, as with the plaintiff below. We are to assume that the place sold to McPhee was the property of Sells, as the head of his family; that with a part of the money he bought the land in dispute from Rondeau & Company, that he did so in good faith, with intent to reinvest the proceeds of his homestead in it, and that by a mistake, or by ignorance, or fraud of the agent sent to Orme, the deed was made, not to himself but to Mrs. Sells, as a free trader, and that the defendant below bought the land with full notice of the facts. Assuming this, we have not the slightest doubt that under the law such a mistake will not be permitted to deprive him of his property. If this mistake did in fact occur, Mrs. Sells (free trader) was a trustee for Sells as the head of his family. Equity would have arrested the mistake as to her, and against purchasers from her with notice. We do not see that any irregularity in the sale to McPhee of the homestead can affect the question as to Murray. Mrs. Sells did not, if the case be as the plaintiff below claims it and as the jury has found, pay for the Rondeau property in any way. The money came from Sells; where he got it is immaterial; he did not pay it to Rondeau & Company for the purpose of buying the property for Mrs. Sells, free trader. It was intended to be his own property; the investment of the money he got from McPhee and Mrs. Sells (the free trader) had nothing to do with it. Nor is it material

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whether the mode taken to reinvest was by consent and approval of the ordinary, so far as the present dispute was concerned. Admit that McPhee was defrauded by Sells, still, if Sells took the money and invested it as a homestead, for himself, as the head and trustee of his family, he had a right to do it as against Rondeau & Company and their creditors, though he had a dozen homesteads. Though his own creditors might object, what right have the creditors of Rondeau to find fault. Sells was not one of that firm, and if he intended to, and did in fact, invest the money he got from McPhee, as he says he did, and the deed was by mistake made to Mrs. Sells, (free trader,) Sells, as the head of his family, has as much right to correct the mistake as though John Doe had invested money, as the head of his own family, and by mistake the deed had been made to Amy Sells, free trader. Some of the facts in the record go to create a strong suspicion that the whole story is a got up thing to hide Rondeau & Company's property, and had the jury found for the defendant below their verdict could have been sustained on this ground. But the judge put all these circumstances fairly before the jury, and put them, as we think, strongly for the defendant. But if Sells *did* put the McPhee money into this property, as he says, and as Rondeau says, and with the intent and object stated, the case for the plaintiff below was very clear under the law. It is the simple case of a man buying property, and by a mistake in the deed, the title is made to a wrong name and wrong person. That is the legal aspect of it if the jury have found rightly on the facts. That the money Sells used to make the purchase was chargeable with the homestead interest, or claimed to be charged, has little to do with it. The McPhee property never, in any sense, belonged to Mrs. Sells, free trader. It was set apart to Sells, as the head of his family, as a homestead for them under him, and he being no part of the firm of Rondeau & Company, there is no reason why his property, or the proceeds of it, should go to their debts.

2. Properly, the objection to the amendment is not before us. The decision of the court overruling it occurred at the

trial and no interlocutory bill of exceptions was filed. The allowing of the amendment is not one of the grounds for a new trial, and the bill of exceptions now before us, was not signed by the judge until after his judgment overruling the new trial, which was more than thirty days after the adjournment of the court at which the trial before the jury took place. But as there may be some question whether, if the amendment was not good, the verdict and charge are illegal, based, as they are, upon the idea that the jury might treat the deed from Orme as a mistake, and as though it were reformed, we feel it to be our duty to decide whether the amendment was properly allowed. Under section 3082 of the Code, a suitor *may* choose his forum. He is not compelled to go into equity, and the superior courts are clothed with full power to mould their verdicts and judgments so as to grant equitable relief. Without doubt, under the facts set forth in the amendment, equity would grant the relief sought. And under the broad power of this section, we think the amendment was properly allowed; perhaps the prayer for a formal reform could not be granted for want of Orme as a party. But the court might, as against the defendant, who is charged with full notice, decree that he shall stand in Mrs. Sells' shoes, who, if the facts stated in the plea be true, is clearly only a trustee for the persons who should have been the named grantees in Orme's deed. It is a purely technical objection to say that this is a purely equitable proceeding. A court of law can do all that is asked, without any help from the peculiar processes or forms of proceeding usual in equity. Nothing is required but to recognize as legal, rights which are, in fact, perfect equities, and enforce them. If the section of the Code enlarging the jurisdiction of the superior courts, as courts of law, does not go this far, it might as well be dropped altogether. Nor is it any good objection to this amendment that the original proceeding is in the statutory form. No new parties are introduced, no *new* right of action is asserted; the amendment is merely to state in a new form, the right which is claimed in the original declaration, to-wit: that the title is in Sells, as

the head of his family; and in this respect it comes within even the narrow rule laid down. We think, therefore, the judge was right in allowing this amendment and in admitting evidence to support it, and in charging the jury as he did as to its power under it.

3. The objection that a mistake to be corrected must be mutual, is true of a simple mistake, for if both parties be not mistaken, one of them has either acted *bona fide*, and has a right to his bargain, or he has been guilty of fraud, which stands for relief upon its own ground. But here, Orme was a mere nominal party to the deed. The real contractors were Sells and Rondeau & Company. Orme lost all interest when his money was paid, and he did not care to whom he made the deed, if Rondeau & Company were willing. Assuming, which we must do, in asserting the legal proposition, that this trade between Sells and Rondeau did take place, as they both say, and as the jury has found, it would be very extraordinary if equity would be so hampered by the technical rule that mistakes in contracts must be mutual to be corrected, as to refuse to interfere, when, as to the parties really at interest and really contracting, the mistake was mutual, because Orme, the mere nominal party, holding nothing but the paper title, and who was already bound by his bond to make the deed to Rondeau & Company's direction, was not mistaken. To do so would, indeed, be sticking in the bark, and would be utterly at variance with that broad rule so familiar and so dear to a court of equity, that it will look to the substance and not to the form of matters which come before it.

4. We do not think the court erred in his charge. In substance he did say that all the defendant's equities were to be considered, if the jury deemed them superior to the plaintiff's, and had the jury been satisfied from the evidence that Rondeau & Company had any tangible interest in the property, we think, under the charge, it would have been their duty to burden the plaintiff's recovery with the discharge of that interest. But if Sells and Rondeau tell the truth, the title to this land was really in Sells, and he was entitled to recover

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it; and any interest Rondeau & Company had in it, or Mrs. Sells, as a free trader, had, the defendant would, in equity, and under the pleadings at law, have a right to set up as a charge upon the land. There is quite strong proof that Rondeau & Company furnished the material and much of the work to build the houses, though Rondeau testifies that Sells always kept money on deposit with him to pay for these things, and that they were paid for. But in no event, under the evidence, could *these* equities have been considered by the jury, for the simple reason that there was no evidence at all as to the value of these advances of work and material by Rondeau & Company. Any consideration of them, with a view of decreeing in their favor, would have been improper, because there was not a particle of evidence as to the value or extent.

5. We think the charge as to the fraud of Kyle was properly refused. Murray can not plead as against even Mrs. Sells' the fraud on Kyle, if there was a fraud. He, Murray, has nothing to do with Kyle, who doubtless will take care of himself, and he is no privy of Kyle's. Courts do not undertake to hold people to their acts, which are false or untrue, except as against persons who have been injured by the fraud, or who have acted on it as a consideration moving them to act, and there is no pretence of that as to Murray. We doubt if this written request fairly means anything more than that Kyle was defrauded. The parties are bound by that fraud, even as to Murray. But it is contended that the request has a wider range, and that in this refusal the court declined to charge, that if the deed to Mrs. Sells and to Kyle was only part of a scheme to defraud Rondeau & Company's and Mrs. Sells' creditors, then they would be bound. But this is in fact the whole of the defendant's case, and was given in the very strongest terms by the judge. Nor was it possible for them to suspect that by his refusal of this charge he had repudiated what he so strongly and emphatically told them was the very point of the case. Indeed, *that* and *that* alone was the issue on trial. It was not material as a matter of law whether it was Sells' homestead money or his private money

that bought this land. If Sells saw fit even of his private money, or of money which he fraudulently got from McPhee, to buy this land for the special use of himself, as the trustee of his wife and son, under the terms of the homestead act, and the deed was made by mistake to Mrs. Sells, as a free trader, then, as against Mrs. Sells or her creditors, or the purchaser at bankrupt sale, with notice, the plaintiff was entitled to recover. But if the scheme was a mere device to cover Rondeau & Company's property, or Mrs. Sells' property, from the debts of the firm, then he did not have a right to recover. The judge gave this to the jury as the law, perhaps not so strongly for the plaintiff as he ought, and there is nothing in his refusal of this charge as to the fraud upon Kyle that in the least takes back or modifies this main point, and the jury fully understood this.

6. The true complaint in this case is with the verdict of the jury. They saw fit, in spite of the various *indicia* of fraud on Rondeau & Company's creditors, pointed out so strongly by the judge, to believe Sells and Rondeau; and so believing, they found for the plaintiff. There is a great deal of evidence in the record tending to show that the truth of the case is with the defendant, and had the jury so found we should have said, amen. But the contrary is the case, and we have no right to interfere. Two witnesses sustain the verdict entirely and emphatically. On the other side, there are very suspicious circumstances—but that is all, going to discredit Sells and Rondeau. The jury, after weighing all, have believed Sells and Rondeau; and as we have said in such cases so often, we have not the right to interfere. By our law the jury's verdict is final upon facts like these.

Judgment affirmed.

 Brockett vs. Bradford.

F. S. BROCKETT, for use, etc., plaintiff in error, vs. JESSE J. BRADFORD, sheriff, defendant in error.

1. That the name of the plaintiff has been twice changed by amendment in the progress of a suit, is no ground to quash the execution based upon the judgment obtained therein.
2. Two executions were in the hands of the sheriff. He also had the proceeds of the sale of the defendant's property, not enough to satisfy both executions. The owner of the junior *fi. fa.* gave him notice to hold up the amount due on the senior as he intended to contest its validity. Thereupon, the sheriff retained such sum, but paid over to the junior *fi. fa.* the remainder of such fund. Pending the contest upon the validity of the older execution, arising upon a rule against the sheriff, the defendant died, and the ordinary allowed to his family a sum of money for their year's support.* His widow, thereupon, petitioned the court to have the balance in the hands of the sheriff paid over on said allowance. The court so ordered, and directed further that the sheriff pay over the amount due on said senior execution within thirty days, and in default thereof, that he be attached for contempt. Held, that inasmuch as the claim of the widow was not in the sheriff's hands when he made the appropriation of the proceeds of the defendant's property, by retaining the amount due on the senior *fi. fa.* for the payment thereof, and crediting the balance on the junior *fi. fa.*, such subsequently acquired lien should not have been allowed to interfere with the rights of the parties as they stood at that time.

Rule against sheriff. Lien. Judgments. Appropriation of payments. Before Judge JAMES JOHNSON. Muscogee Superior Court. November Term, 1873.

This case was before the supreme court in *45th Georgia Reports* 93; *49th Ibid.*, 551.

For the facts, see the decision.

HENRY L. BENNING, for plaintiff in error.

L. T. DOWNING; PEABODY & BRANNON; WHITTLE & GUSTIN, for defendants.

WARNER, Chief Justice.

This was a rule against the sheriff of Muscogee county requiring him to show cause why he should not pay over to

plaintiff in *fi. fa.* the money in his hands arising from the sale of the property of Winter, the defendant therein. The proceeds of the sale of defendant's property, as appears from the record, was \$3,500 00. On the day of the sale, the plaintiff, Peters, placed his *fi. fa.* in the sheriff's hands with the notice to retain the money due thereon. The sales of the property were made in April and May 1871. The sheriff retained an amount of money in his hands sufficient to pay the amount of the Peters *fi. fa.*, which was the oldest, but paid the balance in his hands to the Brockett *fi. fa.*, under which the property was sold, and which was credited thereon, amounting to \$2,500 00 leaving a balance due thereon unpaid. Brockett contested the validity of Peters *fi. fa.*, insisting that it was void, on the ground that pending the suit in which the judgment was obtained, that the name of William C. Daniel was inserted as plaintiff therein, in lieu of Peters, by an order of the court, and that by another order of the court, the name of Daniel was erased, and that of Peters reinstated, so that the judgment was rendered in the suit in favor of Peters, as it was originally brought. During this contest between the parties for the money claimed by Peters on his *fi. fa.*, the rule against the sheriff still pending, Winter, the defendant in both *fi. fas.*, died, and his widow obtained an allowance for her year's support out of the estate of her deceased husband, by an order of the ordinary of Bibb county, for the sum of \$5,000 00 which was dated 27th June, 1873. The time of the death of Winter does not appear, but it was admitted on the argument that he did not die until long after the granting of the rule *nisi* against the sheriff. A certified copy of the order of the ordinary of Bibb county was placed in the sheriff's hands some time in the year 1873, the exact date does not appear, claiming the money in his hands as a superior lien to either of the contestants therefor. The questions involved in the case were submitted to the judgment of the court without the intervention of a jury. The court allowed the sum of \$720 00, the amount claimed by Mrs. Winter, as a superior lien, and ordered the sheriff to pay that amount to her, and also ordered that he should pay the

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sum of \$988 40 to the Peters *fi. fa.*, within thirty days, and in default thereof, that he be attached for contempt of court, and this judgment of the court was excepted to and error assigned thereon.

1. We find no error in the refusal of the court to quash the Peters *fi. fa.* The court may have had good and sufficient reasons showed to it at the time, for passing the orders changing the names of the parties to the suit in which the judgment in favor of Peters was obtained; the legal presumption is that it had, and the most that can be claimed is that the proceedings were irregular, but that would not make the judgment void.

2. This is a proceeding against the sheriff for contempt of court, for retaining money in his hands collected by him in violation of his duty as sheriff, and the question is, has he violated his duty, so as to subject him to an attachment for contempt of court? What has he done? He sold the property of the defendant for \$3,500 00, and after retaining a sufficient amount in his hands to pay off the Peters *fi. fa.*, which he was notified to retain, and which was the oldest *fi. fa.*, he paid the balance of the money in his hands arising from the sale of the defendant's property, to the Brockett *fi. fa.* under which the property was sold, there being no older lien in his hands at the time entitled to claim the money, except the Peters *fi. fa.*, and he retained money enough to pay what was due upon that at the time he was notified to hold it. The sheriff, in contemplation of the law, appropriated the money first to the payment of the Peters *fi. fa.*, which was the oldest lien in his hands, by retaining the money for its payment, and then paid the balance to the Brockett *fi. fa.* We think he performed his duty, in view of the facts, as the same existed at the time he acted upon them. It was not his duty to retain *all* the money in his hands when he was only notified to hold enough to pay the Peters *fi. fa.*, there being no other older lien in his hands entitled to claim the money than the Brockett *fi. fa.* The sheriff appears to have acted in good faith in the matter. Assuming Mrs. Winter's claim to be one of superior dignity, the sheriff had no notice of it at the time he acted in paying

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out the money to the Brockett *fi. fa.* and could not have had any, as Winter was not then dead. When the court orders him to pay Mrs. Winter's claim of \$720 00 and the Peters *fi. fa.* out of the money in his hands, it orders him to be attached for contempt for paying, at least \$720 00 to the Brockett *fi. fa.*, at a time when he could not possibly have had any notice of her lien upon the money. Inasmuch as the lien of Mrs. Winter was not in the sheriff's hands at the time he made the appropriation of the money arising from the sale of Winter's property, to-wit: retaining the amount due on the Peters *fi. fa.* for the payment thereof, and crediting the balance of the money on the Brockett *fi. fa.*, the subsequently acquired lien of Mrs. Winter, should not have been allowed to interfere with the rights of the parties as they stood at *that time*. Peters is entitled to have the amount due on his *fi. fa.* from the sheriff, at the time the notice was given to him to hold the money, and the rule should be made absolute against him for that amount, and the rule discharged against him so far as the payment of Mrs. Winter's claim is concerned, and as to the amount credited on the Brockett *fi. fa.*, and it was error, in view of the facts of this case, to allow the claim of Mrs. Winter, and to subject the sheriff to the payment thereof by granting a rule absolute against him.

Let the judgment of the court below be reversed so far as it allows the claim of Mrs. Winter to be enforced against the sheriff, and the court proceed to render its judgment in the case, in conformity with this opinion.

ELIZABETH J. MOUNGER, plaintiff in error, vs. MASTIN H. DUKE, administrator, defendant in error.

1. It is not necessary that an acceptance of a trust should be in writing. It may be done by acts as well as words. Code, section 2339.
2. Although the words of a deed or will may be such as do not create a separate estate in the wife, yet if the husband accept the appointment of trustee for his wife under order of the chancellor, and receives property as such, recognizes it as belonging to his wife, and admits that it

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is hers during his life, the wife can maintain a bill against the legal representative of her husband after his death for such property, or for the property in which the same may have been invested by the husband.

3. In this case there was sufficient evidence that the husband, as trustee, received money from the former trustees of the wife, and of his investment of the same in the land in controversy, to entitle complainant to have had the case passed on by the jury.

Trusts. Husband and wife. Estoppel. Before Judge KIDDOO. Randolph Superior Court. May Term, 1874.

Elizabeth J. Mounger filed her bill against Mastin H. Duke, as administrator upon the estate of Edwin Mounger, deceased, making, in brief, the following case:

On December 1st, 1869, complainant, then Elizabeth J. Allen, and Edwin Mounger were married. Her husband was insolvent but she was possessed of a considerable estate, real and personal, for her life, remainder to her children. This property was conveyed by her father, William Ball, to her brothers, William G. Ball and James G. M. Ball, in trust for the sole and separate use of complainant during her life, remainder to her children. Some time in the year 1851 said trustees were removed and her said husband appointed in their place by the chancellor. Said trustee thus became possessed of property to the value of \$10,000 00. With a part thereof, on March 1st, 1853, he purchased from one Daniel Rumph six hundred and seventeen and a half acres of land in Randolph county, at the price of \$3,000 00, taking the title to himself individually. Subsequently, on November 17th, 1859, he purchased from Manning G. Stamper, with a portion of said trust estate, two hundred and two and a half acres of land in said county, taking the title to himself individually, for the sum of \$1,000 00. On February 5th, 1861, said trustee, with James L. Ross, purchased from William Glover, as administrator of Joshua Pharaoh, deceased, lot of land two hundred and thirty-one, in the ninth district of Randolph county, containing two hundred and two and one-half acres, for the sum of \$500 00. The title to the interest thus purchased by said trustee was taken to himself individ-

ually, though the trust funds-aforesaid were again used in paying therefor. On April 10th, 1862, said trustee purchased, with the funds aforesaid, from James L. Ross, seventy-five acres of land for the sum of \$500 00, taking the deed thereto in his own name. Said trustee thus expended \$4,750 00 of the funds of said estate in the purchase of nine hundred and ninety-seven and one-half acres of land, taking the title to the same in his own name. On December 13th, 1871, Edwin Mounger died, leaving little or no means whatever. Soon after his death complainant, for the first time, discovered that the title to the land aforesaid had been taken to him individually, and not as trustee. During his life he never made any claim to the same, but invariably referred to said property as belonging to complainant and her children. At the time of his death complainant was possessed of personalty, consisting of horses, mules, cows, hogs, household and kitchen furniture, to the value of \$1,000 00, making an estate of \$5,000 00 by including the realty aforesaid. At the October term, 1872, of the court of ordinary of Randolph county, the defendant, who married a daughter of complainant, was appointed the administrator of her deceased husband. Said administrator claims that the realty aforesaid, as well as said personalty, belongs to the estate of his intestate, and he intends to take possession of the same and to eject complainant. Waiving discovery, she prays as follows: 1st. That the defendant may be enjoined from interfering with the possession of complainant, of said realty and personalty. 2d. That said property may be decreed to be the sole and separate property of complainant during her natural life, with remainder to her children. 3d. That the writ of subpoena may issue.

The answer of the defendant denied that Edwin Mounger ever accepted said trust, or that he admitted that the property aforesaid had been purchased with trust funds; alleges that he always claimed said property as his own.

Upon the trial the complainant introduced the following evidence:

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1st. Deed executed by William Ball, on July 25th, 1832, conveying to William B. Ball and James G. M. Ball three negroes, in trust for the benefit and use of his daughter, Elizabeth J. Allen, during her natural life, remainder to her children.

2d. Deed of similar character, between the same parties, bearing no date, and conveying one negro.

3d. Will of William Ball, in which the preceeding gifts are recited as "in trust for the said Elizabeth and the heirs of her body." It also directs, after disposing of certain property, that the remainder of his effects should be equally divided between his legatees. James G. M. Ball qualified as executor in March, 1837.

4th. Decree of the chancellor, passed at April term, 1851, of Randolph superior court, appointing Edwin Mounger as trustee for claimant in place of William B. Ball, removed from the state, and James G. M. Ball, resigned.

5th. The deeds referred to in the bill conveying certain lots of land in Randolph county to Edwin Mounger individually, alleged to have been paid for with the funds of the trust estate.

6th. Letter of date January 28th, 1851, from William B. Ball to Edwin Mounger, in which he objects to paying to the latter the trust funds in his hands until said Mounger shall have been appointed trustee.

7th. Letter of date October 20th, 1851, from the same to the same, in which the writer expresses himself "glad that the business has been arranged," and promises to send check for funds in his hands in December. He also stated that he "never felt safe in giving up the trust until some one was legally appointed to receive it."

The complainant then established by several witnesses that the lands in controversy were paid for with the proceeds of what was claimed to be the trust estate; that Edwin Mounger received into his hands funds from the former trustees; and that he, during his life, recognized that the property belonged to his wife and children.

Upon complainants announcing closed, the defendant moved for a non-suit upon the following grounds, to-wit :

1st. Because the words used by said William Ball in the two deeds to William B. Ball and James J. M. Ball, conveying the four negroes in trust for the use and benefit of complainant, did not create in her a trust and separate estate.

2d. Because the words used in said will of William Ball in making said gifts and bequests to complainant, did not create a separate and trust estate in her.

3d. Because the evidence submitted did not authorize a decree.

The motion was sustained and complainant excepted.

WORRILL & CHASTAIN, for plaintiff in error.

H. & I. L. FIELDER, for defendant.

TRIPPE, Judge.

1. Section 2339 of the Code enacts that an acceptance of a trust may be by acts as well as words, and that after acceptance no disclaimer will remove the character of trustee.

2. Although the words of a deed or will were not such as to constitute a separate estate in the wife, and under such words as were used, the husband could, before the act of 1866, have claimed title by virtue of his marital right, yet if he himself accepts the position of trustee, receives the property as trustee, treats it as such, acknowledging it to be trust property during his life, neither he, or his representative after his death, can deny the character in which the property was received by the husband. The principle involved in this point arose and was decided in the case of *Brown vs. Kimbrough et al.*, 51 *Georgia*, 35. The reasons are given in that case showing that an acceptance of a trust, or the creation of one, by the husband, operates upon the construction to be given to the conveyance, and words, which would not, where a third person is the grantor or trustee, create a separate estate in the wife's will, do so where the husband is the grantor, or does

Davis et al. vs. Brookins.

himself accept the office of trustee, under a conveyance made by another. That decision controls this point in this case, and we think there was error in sustaining the motion to dismiss on this ground.

3. We think the testimony as to the husband's having, as trustee, received money from a former trustee of his wife, and of his investment of the same, was sufficient to entitle the complainant to a hearing before the jury. What the jury should have done we do not say. But they should be allowed to determine the facts under the principles which should control the case, to be given them in charge by the court.

Judgment reversed.

WILLIAM A. DAVIS *et al.*, plaintiffs in error, *vs.* HAYWOOD BROOKINS, ordinary, for use, etc., defendant in error.

When a portion of the distributees of an estate brought an action against the administrators for their distributive shares, and it appeared on the trial, that the administrators had, in their returns to the ordinary, charged on one side of the account the amounts with which they were chargeable, and on the other side the amounts paid out by them, not only to charges against the estate, but also amounts they had paid to portions of the distributees, on account of their shares, and then struck a balance and reported that balance as due the estate:

Held, that a balance so found, was not a proper basis from which to ascertain the amount due any one, or more, of the distributees.

Administrators and executors. Accounts. Before Judge HERSCHEL V. JOHNSON. Washington Superior Court. September Term, 1873.

The above head-note states the sole point passed on in this case so clearly that any further report is unnecessary.

LANGMADE & EVANS; SANFORD & FURMAN; H. D. CAPERS, for plaintiffs in error.

R. L. WORTHEN, by PEEPLES & HOWELL, for defendant.

MCCAY, Judge.

We do not express any opinion on the questions made in the bill of exceptions on the charges of the court, for the reason they are not certified to be true. If parties see fit to fail to get the judge to verify their points, at the term when the new trial is moved, they must take the consequences of any failure in the judge's memory. But it is patent to us, unless we wholly mistake the returns put in evidence, that the jury have found their verdict on a mistake as to the effect of the last return of the administrators. That return admits that they have on hand, and have had since 1861, about \$2,500 00, but it does not follow that this sum is due to these plaintiffs, or any of it. The question is not what the administrators have on hand arising from the assets, but whether there is anything in hand belonging to these plaintiffs. What is there, may, and as it appears to us does, mainly belong to the two or three out of the thirteen distributees, who had, in 1861, got nothing. The true way to find the amount due, is to find what amounts went in the hands of the administrators. Then what amounts are charges against the *estate* as debts, expenses, etc., find one-thirteenth of this, and then inquire if each of the plaintiffs has or has not got his one-thirteenth. We do not make the calculation because the vouchers are not in the record, and it is impossible to say what payments were to debts or expenses, and what to the heirs as such. We think justice requires a new trial, and that the writing off, as required by the judge, does not fully meet the case.

Judgment reversed.

HOMER V. GODBEE, administrator, plaintiff in error, vs.
GEORGE W. SAPP, defendant in error.

The admissions or declarations of an executor are only competent evidence as to his own acts after he became clothed with such trust, and do not

Godbee vs. Sapp.

bind the estate which he represents in so far as they refer to what was told him by his testator during life.

Executors and administrators. . Admissions. Evidence.
Before Judge GIBSON. Burke Superior Court. November
Term, 1873.

For the facts, see the decision.

CORKER & DICKSON, for plaintiff in error.

J. J. JONES, for defendant.

WARNER, Chief Justice.

This was an action brought by H. V. Godbee, administrator *de bonis non* with the will annexed of F. G. Godbee, deceased, against G. W. Sapp, on a promissory note for \$1,650 00. The defendant pleaded that the note was given without any consideration. On the trial of the case, Jones, a witness for the defendant, was offered to prove "that Perkins said to witness at the time of the appraisement of the estate of deceased, F. G. Godbee, that F. G. Godbee, deceased, told him before his death, that he had never received from defendant the amount of the note given him by Sapp for the sum of \$1,650 00." To the admission of the foregoing evidence, the plaintiff objected, which objection, was overruled by the court, and the plaintiff excepted. The jury, under the charge of the court, found a verdict for the defendant as to the amount of the \$1,650 00 note. In our judgment, the court erred in admitting in evidence the declarations of Perkins, as to what he and Godbee said in relation to the \$1,650 00 note. The admissions or declarations of Perkins were only admissible as to his own acts and conduct, after he became clothed with the trust as executor. What Godbee told him, was merely hearsay evidence, and should not have been received. The evidence as set forth in the bill of exceptions, was also objectionable on the ground that it did not tend to prove the failure of the consideration of the note. The evi-

Hackenhull vs. Westbrook.

dence as set forth in the bill of exceptions is, that Perkins said to the witness, that Godbee told him before his death that he had never received from the defendant, the amount of the note given him by Sapp for the sum of \$1,650 00. Godbee held Sapp's note for that amount, and if he had never received the amount of the note from Sapp the presumption would be that he still owed it. There is nothing in that evidence going to show a failure of the consideration of the note.

Let the judgment of the court below be reversed.

JOHN HACKENHULL, plaintiff in error, vs. JOHN R. WESTBROOK, defendant in error.

1. A mortgage on real property must be foreclosed in the county where the property lies, and where the judgment of foreclosure is granted in the county of the mortgagor's residence, which is not in the county where the land is situated, the claimant of the land under a levy of the mortgage *fi. fa.*, may raise the objection on the trial of the claim.
2. When the court on the trial of a claim case rejects the plaintiff's *fi. fa.*, it is error to allow a verdict to be taken for the claimant. The plaintiff's case should be dismissed.

Mortgage. Jurisdiction. Claim. Practice in the Superior Court. Before Judge KNIGHT. Forsyth Superior Court. April Term, 1873.

Robert M. Barrett executed a mortgage to John Hackenhull on two lots of land lying in Forsyth county, and on one lot in Dawson county. The mortgage was recorded and foreclosed in the latter county. The execution based on said foreclosure was levied on the two lots situated in Forsyth county. To this property a claim was interposed by John R. Westbrook. Upon the trial of the issue thus formed, the court, on motion of counsel for claimant, excluded the mortgage *fi. fa.* upon the ground that the superior court of Dawson county had no jurisdiction of proceedings to foreclose as against the two lots situated in Forsyth. To this ruling plaintiff excepted.

Walters vs. Odom.

The court then directed the jury to return a verdict for the claimant, and plaintiff again excepted.

Error is assigned upon each of the aforesaid grounds of exception.

WIER BOYD, for plaintiff in error.

JASPER N. DORSEY, for defendant.

TRIPPE, Judge.

1. The court below committed no error in holding that a mortgage on land must be foreclosed in the county where the land lies. This was the provision of the act of 1799, Cobb Digest 570, and is transferred to the Code, section 3962. This being so, the claimant in this case had the right to object to the mortgage *fi. fa.* issued from the superior court of Dawson county and to the proceeding to foreclose in that county, when the land claimed was situate in the county of Forsyth. If the judgment or record showed that the court rendering the judgment did not have jurisdiction of the subject matter, any person whose rights would be affected could, at any time, make the objection: Code, sections 3594, 3596.

2. But it was error in the court after the rejection of the *fi. fa.* to direct the jury to render a verdict for the claimant. In *Baker vs. Shepherd*, 37 Georgia, 12, it was held "that when the court rejected the plaintiff's *fi. fa.* when offered in evidence in a claim case, it was error to allow a verdict to be taken for the claimant. The court should have dismissed plaintiff's case."

For this reason and on this ground the judgment is reversed.

JEREMIAH WALTERS, plaintiff in error, vs. GEORGE W. ODOM, defendant in error.

A receipt for money in full of all demands is always open to contradiction or explanation. The rule that parol evidence is inadmissible to contradict or vary writings does not apply to it.

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The defendant stated that on the preceding day he had agreed to take \$500 00 in settlement of the matter between them; that he was willing to give that sum and take a receipt in full, but would not pay a single cent without. The plaintiff then wrote the above receipt and defendant paid him. It represented the balance of the \$500 00 due to plaintiff, after deducting his indebtedness to defendant. He accepted the receipt as a final settlement and left the room with that understanding. Did not hear the plaintiff say that he would not be bound by the receipt.

The plaintiff denied the above statement thus far. When he presented the account for \$1,000 00 and the defendant stated that it was not in accordance with the agreement of the previous day, he replied, "I have no money; I owe some debts. This is my only chance to get it. I will not be bound by it." He testified that the defendant was deaf, but he knew that he heard the remark; that he repeated it several times; that he wrote the receipt and handed it to defendant; that the defendant paid him the \$500 00 less \$195 94, due by plaintiff to him, took the receipt and left.

..... Robert corroborated, in substance, the testimony of the plaintiff.

The defendant moved to rule out the evidence of plaintiff and Robert so far as it tended to vary and destroy the legal effect of the aforesaid receipt. The motion was refused and defendant excepted.

The jury found for the plaintiff the full amount sued for. The defendant moved for a new trial, among other grounds, because the court failed to exclude the aforesaid testimony. The motion was overruled and defendant excepted.

SMITH & JONES; VASON & DAVIS; R. F. LYON, for plaintiff in error.

D. H. POPE; G. J. WRIGHT, for defendant.

McCAY, Judge.

Our Code, section 3807, is plain and positive that "a receipt for money is only *prima facie* evidence of payment, and may be denied or explained by parol." If this means any thing, it means that a receipt for money is an exception to the otherwise universal rule that parol evidence is inadmissible to vary or alter the terms of a valid written instrument: Code section 3800. And this is laid down in all the text books upon evidence, as the common law, so that it may be said generally, that a receipt may always be denied or explained, even though the words are plain, and though they express exactly the intent of the parties. It is true there are expressions by judges to the effect that fraud, mistake or imposition must appear, to justify an attack upon plain words, even though they be in the shape of a receipt. And simply to take the head-notes of cases, as they are scattered through the books, one is struck with the apparent conflict in the decisions upon this point. But we think it will be found, on close examination, that the conflict is apparent rather than real. If a receipt is a contract and not simply a receipt, there is no reason why it should be susceptible of attack or explanation by parol more than any other contract. And many of the cases cited as denying the right to explain turn on this distinction. So, too, many, nay, perhaps most of the cases, where a receipt has been explained or contradicted, have been cases where there was fraud, mistake or imposition, as to the meaning of terms used, and the ground of explanation has been referred to the fraud, mistake, etc.

But, it must be remembered that any written instrument may often, at law, and generally, in equity, be attacked or explained, for fraud, accident, mistake and imposition, and yet even equity writers lay down the rule that receipts stand on a different footing from other instruments. Perhaps the true distinction is that a receipt for money is not a contract at all, but a simple admission in writing of a fact, an acknowledgment that the writer has received a sum of money in pay-

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ment in part, or in whole, of a particular debt, or in full, and that as such admission, it is just as open to denial or explanation as any other admission in writing of a fact or a set of facts. Such an admission is evidence, and if made knowingly, it is strong evidence, but it is not an estoppel; the truth may be shown to be different, unless some one has acted on it, and then on the principle, not that it is true, but that to deny it would be a fraud. And cases of this kind, where the question upon a receipt has not been *the admission* of parol evidence, but whether, after the facts were out, the receipt was not an estoppel, are some of the cases cited as authority for saying that receipts are sometimes unexplainable by parol.

To apply these principles to the case at bar. This receipt is upon its face a simple receipt for money in full of all demands; *prima facie*, it is evidence of full payment, but is open to explanation. The giver of it may show that, in fact, only \$500 00 was paid, and this is the general rule. But when the proof is out, if it appear that in fact this \$500 00 was a payment of part of the whole, in consideration of a release of the remainder of a claimed debt which was disputed, and that the receipt was given by one and acted on by the other with that view, then, not the receipt but the transaction is binding, it is a good accord and satisfaction. Ordinarily, this is not the meaning of even a receipt in full. Such a paper usually means that all has been paid that the party giving it claims to be due. The receipt must be explained, added to by parol evidence, to make it mean accord and satisfaction. To make this receipt mean what Roberts says it means, his *testimony* of what transpired at the time, must be gone into, and the same thing is true as to Robert's and Odom's testimony. At least, therefore, both parties undertake to make this receipt mean something else than on its face it meant. Its natural, ordinary meaning is, all is paid that is due, and that is all it means. It is an admission that the signer has got all he claims the other to owe him. Walters insists that under the facts which transpired at the time the \$500 00 was paid by him as a compromise, and in execution of an accord, and that

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it is therefore binding. That was for the jury. Walters so testified, and if the jury believed him, they ought, as the court charged them, to have found for the defendant. But Roberts and Odom deny this, and the jury have given them credence and found for the plaintiff. Odom says he did not receive the \$500 00, as the execution of a contract of accord. Walters says he did. Roberts says that Odom declared he did not, and that Walters heard him.

We do not feel authorized to disturb the verdict, it is a case of conflicting testimony. We simply say that the receipt is not of itself conclusive.

Judgment affirmed.

JOHN M. HILL, plaintiff in error, *vs.* ELIZABETH HATCHER,
defendant in error.

Suit for rent was brought to March term, 1866, of the inferior court of Muscogee county, against J. R. Hull, of said county, and J. M. Hill, of the county of Coweta. Hull acknowledged service on a separate piece of paper, October 31st, 1865, waiving process, etc. No parties were mentioned in this paper, and it was attached to the petition filed in office, January 2d, 1866; but on the hearing of the motion, it was proved that the acknowledgment was intended for this suit. The clerk did not attach a process to the original writ, but issued a second original for Coweta, with a process against both defendants, a copy of which was duly served on Hill. Judgment was regularly obtained at March term, 1866, which Hill, at November term, 1873, of Muscogee superior court, moved to set aside. 1st. Because the court rendering said judgment had no jurisdiction. 2d. Because a second original was not served upon him in terms of the law. 3d. Because he does not owe said debt, and did not when judgment was rendered.

Held, that there was no error in overruling the motion.

Service. Judgments. Process. Before Judge JAMES JOHNSON. Muscogee Superior Court. November Term, 1873.

This case is fully reported in the above head-note.

Hill vs. Hatcher.

R. J. MOSES, by PEABODY & BRANNON, for plaintiff in error.

L. T. DOWNING, for defendant.

TRIPPE, Judge.

The evidence on the hearing of the motion showed that the defendant, Hull, who resided in Muscogee county, where the action was brought, acknowledged service on a separate paper, with the understanding that it was service of notice of this suit. He waived process in that acknowledgment. This paper was attached to the declaration when it was filed in the clerk's office. Hull lived in Muscogee county, and made no objection to the judgment on any grounds, either for irregularity or want of jurisdiction. The superior court of Muscogee county had jurisdiction of the person of Hull and of the subject matter of the action. He does not deny that he was served, or that he waived process, nor even set up that there was any irregularity affecting the proceedings against him. Nor could he successfully deny either of those facts, or at this late day—six years after the judgment—set it aside for irregularity in the manner of the service adopted by himself and acquiesced in so long. If, under the facts, he could not, we see no reason in permitting a co-defendant to avail himself of those facts for his benefit. The judgment is valid against Hull, and if plaintiff in error has it to pay it will be worth to him whatever a valid judgment may avail him for reimbursement, provided he has any claim to it.

The other objection is that plaintiff in error, who resided in the county of Coweta, was not served with a second original in terms of the law. The point in this objection is: that as no process was attached to the original writ, and the second original for Coweta county did have a process, it was, therefore, not a *copy of the former*, and that the law was not complied with, which says that "if any of the defendants reside out of the county, the clerk shall issue a second original and

copy for such other county or counties, and forward the same to the sheriff, who shall serve the copy and return the second original, etc." If the objection made in this case be a good one, then would it apply to every case of a second original sent to other counties. For there is no second original which is precisely a copy both of the declaration (which is filed in the clerk's office) and the *process* attached to it. The *process* to the original is directed to the sheriff of the county where suit is instituted. That attached to the second original and copy thereof, is directed to the sheriff of the county where it is to be sent, which is where the other defendant resides. But it is not necessary to rest this decision on this narrow ground. The original declaration, with the acknowledgment of service and waiver of process, etc., brought the resident defendant properly into court. The second original, with the process attached thereto directed to the sheriff of Coweta, a copy of which was by him served on the co-defendant residing in that county, was notice to him and properly brought him into court. Section 3345 of the Code provides that "no technical or formal objections shall invalidate any petition or process, but if the same substantially conforms to the requisitions of this Code, and the defendant has had notice of the pendency of the cause, all other objections shall be disregarded, provided there is a legal cause of action set forth as required by this Code." With this provision, and other changes in the Code upon the matter of process, it would be a hard stretch of the earlier decisions of this court on this question to hold, under the evidence in this case, six years after judgment has been rendered, with notice of all the facts during that time, that the judgment could be set aside on this ground, the result probably being that the statute of limitations would bar all rights of the defendant in error.

The third ground taken in the motion was not urged, and it is unnecessary to consider it.

Judgment affirmed.

Macmurphy vs Dobbins.

DAVID D. MACMURPHY, clerk, plaintiff in error, vs. MILES G. DOBBINS, defendant in error.

Clerks of the superior court are not entitled to more than \$6 00 costs in each civil case prosecuted to judgment, including the recording of the proceedings had therein.

Costs. Before Judge POTTLE. Richmond Superior Court. October Term, 1873.

For the facts, see the decision.

FRANK H. MILLER, for plaintiff in error.

AMOS T. AKERMAN, by D. P. HILL, for defendant.

WARNER, Chief Justice.

The only question presented by the record in this case for our judgment is, whether the clerk of the superior court is entitled to charge for his costs in civil cases more than \$6 00 in every suit commenced and prosecuted to judgment, including service in recording petition, process and judgment, as specified in the 3695th section of the Code. It is insisted that the clerk is entitled to charge fifteen cents per hundred words for recording proceedings in civil cases, and that includes the recording of the petition, process and judgment in all civil cases. The reply is, that the clerk's fees in every suit commenced and prosecuted to judgment, including service for recording the petition, process and judgment, is definitely fixed and prescribed by the law, and that is true in regard to the clerk's fees in every case, in which his fees are definitely fixed and prescribed, but in other civil cases, in which his fees are not definitely fixed and prescribed, he is entitled to charge for recording the proceedings in such cases, fifteen cents per one hundred words. In regulating the clerk's fees in suits commenced and prosecuted to judgment, including his service in recording the petition, process and judgment, the legislature doubtless intended to provide a fair average compensation for

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the service to be rendered, taking into consideration that some cases would be short, and some longer than others. The clerk gets his \$6 00 in the short cases, and he is entitled to no more in the longer ones. When the clerk accepted the office, he undertook to perform the duties of it, and render the services incident thereto, for the fees prescribed by law for such services.

Let the judgment of the court below be affirmed.

A. C. DUGGAN, plaintiff in error, vs. A. J. GARNER, defendant in error.

Under the special acts of this case, there was no error in the judgment of the court dismissing the *certiorari*.

Certiorari. Before Judge HERSCHEL V. JOHNSON. Washington Superior Court. March Term, 1874.

A. C. Duggan, on the 12th of April, 1862, obtained four judgments in the justice court of the ninety-sixth district of Washington county, against one A. F. Jordan. Executions were issued from these judgments on April 1st, 1873, and on May 1st, were levied on a horse, mule and other personal property. These levies were stopped by an affidavit of illegality filed by one A. J. Garner. The justice appointed the fourth Saturday in May as the time for the trial of the issue, and notified Duggan and Garner. Plaintiff, after the issue was thus formed and before the day of trial, notified the justice that he would not attend court, and desired the justice not to press the matter further, and requested him so to inform Garner. No court was held at the time appointed, but on that day the justice met Garner in the road, he having started to court, and turned him back by imparting to him plaintiff's request.

Here the matter rested without further action until the 6th of December thereafter, when the justice notified Garner in writing that the issue formed by the affidavit of illegality,

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filed in May before, would be passed upon and disposed of on the 24th instant. In obedience to this summons Garner employed counsel and attended the trial. The parties agreed to try one case and let the judgment govern the others. Plaintiff opened his case by introducing his *fi. fa.*, and moved to dismiss Garner's affidavit of illegality because it was *inter alios acta*. Garner met this motion by making another, to-wit: "to amend the justice's docket by entering upon it a *nunc pro tunc* order in each case dismissing the levy, and offered parol evidence to sustain the motion. To the entertaining of this motion and evidence the plaintiff in *fi. fa.* objected on the following grounds:

1st. Because his motion to dismiss the affidavit of illegality being first in order, had precedence, and should be disposed of before Garner's motion could be considered.

2d. Because Garner not being properly before the court no motion of his could be entertained, but his defense should be dismissed.

3d. Because plaintiff's motion to dismiss the illegality being in the nature of a demurrer to the affidavit, should be heard and disposed of before any evidence should be introduced.

The court overruled plaintiff's objections, and refused his motion to dismiss the illegality, but sustained Garner's motion, and heard the evidence offered by him. After hearing the evidence the court sustained his motion, and passed an order amending its docket dismissing the levies *nunc pro tunc*.

These rulings were carried by writ of *certiorari* to the superior court, where they were sustained, and plaintiff excepted.

The presiding judge certified the bill of exceptions, adding a note as follows:

"I dismissed the *certiorari* in this case on the sole ground that under the proofs submitted in the court below, the court decided correctly in passing the order *nunc pro tunc*, it being manifest that both parties, for several months, had acted upon the understanding that the levy had been dismissed by plaintiff's direction."

Tarver *et al.* vs. Fleming.

J. T. JORDAN, by brief, for plaintiff in error.

GEORGE F. PIERCE, by Z. D. HARRISON, for defendant.

TRIPPE, Judge.

Whether the affidavit of illegality filed by Garner was legally interposed or not, is not the question, and was not decided either by the justice of the peace or by the judge of the superior court on the hearing of the *certiorari*. The justice held that under the proof the levy was to have been dismissed at the court to which the order *nunc pro tunc* refers to-wit: the preceding May term. The judge, in reviewing the testimony, sustained this decision, and further held, that under the testimony it was "manifest that both parties, for several months, had acted upon the understanding that the levy had been dismissed by plaintiff's direction." We do not feel authorized to interfere with these decisions made on the evidence. All the testimony is not set out by the reporter, nor is it necessary, as the justice of the peace and the judge of the superior court were as competent to pass upon the facts as we are.

Judgment affirmed.

HARRIET M. TARVER *et al.*, plaintiffs in error, vs. PATRICK FLEMING, defendant error.

HARRIET M. TARVER *et al.*, plaintiffs in error, vs. PADDY MCGLOHON, defendant in error.

From the facts set forth in the record in these cases, both of which stand on the same principles, there was no error in the judgment of the court making the rules absolute.

Rule against sheriff. Laborer's lien. Before Judge HILL.
Twigg Superior Court. April Term, 1874.

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Tarver et al. vs. Fleming.

The principles involved in the two cases above stated were precisely similar, and therefore only one case will be reported. They were argued and determined together.

On the 28th of February, 1872, Patriot Fleming, by occupation a ditcher, made affidavit before a judge of the superior court, that under a contract with William B. and Benjamin M. Tarver, he labored on their plantation during the year 1871, except in the months of July and August, and twenty days lost time, at the stipulated price of board and \$500 00 for ten months. That for his labor on said plantation under said contract, the said Tarver had become indebted to him in the sum of \$466 66, of which amount only \$35 00 had been paid; that for the balance due demand had been made and refused. On the 8th of March, 1872, the affidavit was filed in the clerk's office, and a *fi. fa.* issued thereon. On the 26th of March said *fi. fa.* was levied on five hundred and thirty-six acres of land in said county, of the value of \$500 00, but no sale had taken place. At the April term, 1874, a rule against the sheriff, at the instance of plaintiff in *fi. fa.*, came on for trial. Upon the trial Harriet M. Tarver having been made a party, showed to the court that at the April term of Twiggs superior court, 1873, she had obtained a decree in equity against William B. and Benjamin M. Tarver, and against certain property therein described (the land upon which the lien *fi. fa.* had been levied being a part of said property) and charged by the will of Hartwell H. Tarver, with the support and maintenance of the said Harriet M., and by judgment of the court made the "first charge and lien" upon said property. That a *fi. fa.* for the principal sum of \$52,500 00, and \$36-750 00 interest, had been issued on said decree, and was in the hands of the sheriff, and insisted that the money which should arise from the sale of said land levied on should be paid to her.

After argument, all parties being represented, it was ordered by the court that "the sum of \$500 00 be brought into court by said sheriff, or so much thereof as is necessary to pay the

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principal, interest and costs due on this (the lien) *fi. fa.*, and be paid over by said sheriff to the counsel for the plaintiff (Patrick Fleming) in satisfaction of the same." To which order and decision the said Harriet M. Tarver and the said sheriff excepted.

J. D. JONES, by Z. D. HARRISON ; WHITTLE & GUSTIN,
for plaintiffs in error.

LANIER & ANDERSON, for defendants.

McCAY, Judge.

We find no error in the judgment making the rules in these cases absolute. The sheriff has failed to obey the process, and he is in contempt. Nor can we see what Mrs. Tarver's execution has to do with this failure of the sheriff to seize and sell as required by the labor *fi. fas.* Suppose she has a superior lien, is that any excuse for the sheriff? Nor are we prepared to say that this judgment in favor of Mrs. Tarver, is a judicial determination that her lien is a higher one than that of these plaintiffs' *fi. fas.* who were not parties to that suit. As to a good deal of the property described in this *fi. fa.* of Mrs. Tarver, to-wit: all of it that is not the specific property charged by the testator with the support of his widow, we should hesitate long before giving her a preferred lien as against parties who were not parties to that decree. The bill and answers not being before us, we cannot, as a matter of course, decide upon their effect, but so far as we can now see we think these laborers ought to have their money, even as against Mrs. Tarver.

Judgment affirmed.



Smith vs. Stapler *et al.*

JAMES M. SMITH, governor, for use, plaintiff in error, vs.
WILLIAM L. STAPLER *et al.*, defendants in error.

The sureties of the ordinary on the bond required by section §21 of the Code. are not liable in damages to one who claims to be the lowest bidder under proposals for letting out a contract to build a bridge, because the ordinary awarded the contract to another bidder.

County matters. Ordinary. Before Judge JAMES JOHNSON. Muscogee Superior Court. November Term, 1873.

James M. Smith, as governor of the state of Georgia, for the use of R. S. Reynolds, brought debt against William L. Stapler and Thomas C. Pridgen, alleging substantially as follows :

The defendants became sureties on the bond of John W. Duer, formerly ordinary of Muscogee county, by which they bound themselves jointly and severally, that the said Duer should well and truly discharge all his duties as ordinary. They have become indebted to the plaintiff in the sum of \$3,000 00, for that, on or about June 1st, 1871, said Duer did commit a breach of said bond, in this that he, as ordinary, did make known that he would receive proposal on bids for building a bridge across the ditch or gully on the old express road, according to certain plans and specifications. That on or about June 14th, 1871, the day for receiving the bids, said Reynolds put in his bid at \$3 50 per foot, said bridge to be one hundred feet long, more or less. That he likewise made known to said Duer his willingness and ability to give bond with good security, for the faithful performance of the work. That said Duer, as ordinary, refused the bid of said Reynolds and accepted that of Mactison Dancer, at \$4 00 a foot. That said Reynolds, being the lowest bidder, was entitled to said contract, and the refusal of said Duer, as ordinary, to award the same accordingly, was in violation of the rights of said Reynolds, and a breach of his said bond, signed and dated January 7th, 1870. Wherefore process is prayed.

It was admitted by counsel that Duer, the ordinary, was

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dead, and all exception to the declaration for failing to account for his not being a party was waived.

On demurrer the declaration was dismissed and plaintiff excepted.

JOSEPH F. POU, for plaintiff in error.

PEABODY & BRANNON, for defendants.

TRIPPE, Judge.

This was a suit against the sureties on the ordinary's bond, that officer being dead. All facts necessary to the full understanding of the case are given by the reporter. Was the action maintainable? We think not; and the court did not err in dismissing it. Section 321, Code, provides that ordinaries "must give bond and security in the sum of \$1,000 00, for the faithful discharge of their duties *as clerks of the ordinary.*" By section 341 they are, by virtue of their offices, clerks of their own courts; "but they may, at their own expense, appoint *one or more clerks, for whose conduct they are responsible.*" Taking these two sections together, it is evident that the bond required by the first does not make sureties thereto liable to a bidder under proposals for building a bridge, because the ordinary did not award the contract to him, although he might be the lowest bidder. The bond was not required to cover any such liability, any more than it was to cover any other erroneous act of the ordinary. If a bidder in such a case is entitled to the contract, and the ordinary fails or refuses to so award it, he is not without remedy for the enforcement of his rights. A prohibition might stop an illegal contract with another, or a *mandamus* might compel the ordinary to execute a legal one under proper circumstances. Certain it is that the bond required by section 321 does not bind the sureties to it for all illegal or erroneous acts of an officer invested with such high authority as the ordinary. Other grounds might be given to sustain the judgment in this case, but it is useless to state them.

Judgment affirmed.

Tudor et al. vs. James.

WILLIAM C. TUDOR *et al*, plaintiffs in error, *vs.* JOHN JAMES,
administrator, defendant in error.

The superior court, in the exercise of its chancery powers, has no jurisdiction to set aside a will which has been admitted to probate, or any clause thereof. Such jurisdiction is vested exclusively in the court of ordinary.

Equity. Ordinary. Jurisdiction. Wills. Before Judge
GIBSON. Columbia Superior Court. March Term, 1874.

For the facts of this case, see the decision.

H. W. HILLIARD, for plaintiffs in error.

ROBERT TOOMBS, for defendant.

WARNER, Chief Justice.

This was a bill filed by the complainants against the defendant, to obtain the possession of certain described property mentioned therein, on the ground that the will of Thomas Tudor, under which the defendant claims the property, is void; that it was the intention of the testator in giving the property to Tillery, the devisee and legatee named in his will, to confer freedom on certain negro slaves, in violation of the then existing laws of this state. The date of the will does not appear, but must have been executed prior to his death, which is alleged to have taken place in January, 1864. It appears from complainants' bill, that the will of Tudor was duly admitted to probate, and that Tillery was duly qualified as executor. The defendant demurred to complainants' bill on the ground that the superior court had no jurisdiction to set aside and declare void the will of Thomas Tudor, or any part thereof, which demurrer was sustained by the court, and complainants excepted. The act of 1818, amendatory of the act of 1801, inhibits the recording of so much of any instrument as relates to the manumitting or setting free of any slave or slaves, and that includes the court of ordinary. The

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will of Tudor has been admitted to probate in that court. The counsel for plaintiffs in error contends that it is not the object of the bill to set aside the probate of Tudor's will, but that must necessarily be done, and more too, before the complainants are entitled to the relief which they seek. So long as the will of Tudor, which has been admitted to probate in the court of ordinary, stands as his will, the complainants can take nothing under it, they therefore ask the superior court, exercising chancery jurisdiction, to declare certain clauses of that will null and void, and unless the latter court does so declare and adjudge, the complainants cannot have the relief which they seek. The question therefore arises whether the superior court, in the exercise of its chancery powers, has jurisdiction to set aside a will which has been regularly admitted to probate in the court of ordinary, and declare the same, or any part thereof, null and void. By the constitution of this state, the powers of a court of ordinary and of probate are vested in an ordinary for each county. By the 331st section of the Code, it is declared that courts of ordinary have authority to exercise original, exclusive, and general jurisdiction of the following subjects matter: Probate of wills, the granting of letters testamentary, of administration, and the repeal or revocation of the same. As before stated, the will of Tudor has been duly admitted to probate in the court of ordinary, and Tillery duly qualified as the executor thereof. In our judgment, the superior court, in the exercise of its chancery powers, has no jurisdiction to set aside the will of Tudor thus admitted to probate, or any clause thereof, but that the jurisdiction to do that is vested *exclusively* in the court of ordinary. That is the court to which the complainants must go to have the will set aside, or any part thereof, and the probate of the same revoked. A demurrer for want of jurisdiction of the court may be made at any time.

Let the judgment of the court below be affirmed.

Dougherty vs. The Western and Atlantic Railroad Company.

MARY ANN DOUGHERTY, plaintiff in error, vs. THE WESTERN AND ATLANTIC RAILROAD COMPANY, defendant in error.

1. Samuel Mitchell, in 1842, executed a deed to the state of Georgia, containing the following grant:

"WHEREAS, The general assembly has, by law, provided for a great public work known as the Western and Atlantic Railroad, a part of which is located on lands belonging to me; now, be it known, that I, Samuel Mitchell, of the county of Pike, and state aforesaid, for and in consideration of the desire which I feel for the interest and prosperity of my state aforesaid, and with a desire to promote every improvement which may be to the welfare of said state, do, by these presents, concede and grant to the said state, for the use and purpose of said road, the right of way, comprising a road or tract of sufficient space and breadth to answer all the convenient and necessary purposes of said road as may be designated by the chief engineer of said state, over and upon a lot of land seventy-seven, (77) in the fourteenth district of Henry (now DeKalb) county, Georgia, together with the privilege of taking and using timber, either stone or gravel, lying and being in said necessary space, for the construction of said road." * * * * *

Lot number seventy-seven is part of the land on which the city of Atlanta is located. The chief engineer of the state, in the same year, by his assistant, laid off and located the right of way for the Western and Atlantic Railroad, on said lot of land, one hundred feet in width, making a chart of the same, which was deposited in his office. At the same time, said assistant engineer surveyed and located for Mitchell a part of the town lots in the city, on lot seventy-seven, including certain city lots numbered by him twelve and thirteen, making the boundary between them and the right of way so laid off, the line as now claimed by defendant, and drafted a map thereof. This was done by him as agent for Mitchell. The main track of the Western and Atlantic Railroad was shortly thereafter laid in the center of the right of way so designated. All the city maps show the same line as the boundary between lots twelve and thirteen, and the railroad. The deed to the state was recorded in October, 1849. In 1847 Mitchell sold lots twelve and thirteen, receiving part of the purchase money, and gave bond for titles. The representative of his estate executed a deed therefor in 1850 to the ancestor of complainant. In the bond and deed, the south line of said lots was given as being bounded by the Western and Atlantic Railroad:

Held, that the boundary of the right of way, as designated by the chief engineer or his assistant by his authority and under his direction, is binding on Mitchell, the grantor, and his privies.

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2. That any question as to the chief engineer having abused his power by laying off the right of way of an unnecessary width, should have been made at the time the same was done or within a reasonable time thereafter, and cannot be raised after the lapse of thirty years.
3. No negotiations or agreement between the officers of the Western and Atlantic Railroad and the purchaser of lots twelve and thirteen, were binding on the state, unless they were made by authority of law. Nor does any possession of, or dominion over, a portion of said right of way, even with the acquiescence of such officers, affect the state, so far as they concern the ascertainment of the true boundary of said right of way, or the right and title of the state to the same.
4. And this is true, whether the deed executed by Mitchell operated as a grant of the fee to the land, or an easement therein.

State. Prescription. Title. Land. Before Judge HOPKINS.
Fulton Superior Court. October Term, 1873.

The pleadings and evidence in this case present, substantially, the following facts:

Complainant owns lots twelve and thirteen, on which the National hotel stands, in Atlanta. She sets up title to a strip of ground, say twenty feet wide, lying between the hotel wall and the railroad. The defendant was laying a side track on a part of this strip. She files this bill to enjoin the laying thereof. An interlocutory injunction was granted, which stood until the trial. The deed on which defendant relies was made by Samuel Mitchell, on the 11th day of July, 1842, the only material portion of which was as stated in the above head-note.

This deed was never recorded until the 11th day of October, 1849.

In 1842, but whether before or after the date of this deed, does not appear, F. C. Armes, as assistant to C. F. M. Garnett, who was then chief engineer, located the state square and the right-of-way through lot seventy-seven, leading to the square. There is no dispute that he (Armes) marked off this right-of-way one hundred feet wide east of Whitehall street, and both Armes and Garnett swear that, to the best of their recollection, it was one hundred feet wide west of Whitehall; and the evidence of L. P. Grant is to the same effect, who

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swears that he often saw the original plat made by Armes. There was no other designation of the width of the right-of-way laid off, than that Armes ran the lines, and made a plat of the ground, which was filed away in the chief engineer's office. The original was lost long ago, and there is no copy or duplicate, but Grant testifies that Vincent's map, made in the year, was modeled after it. By Vincent's map the right-of-way is one hundred feet wide the whole distance. In 1845 complainant's husband bought lots twelve and thirteen, built a dwelling on the property, and it has ever since been in the possession of those claiming under the Dougherty title.

But the bond for titles from Samuel Mitchell was not made until the 23d day of February, 1847, which recites the purchase money at \$400 00, \$240 00 of which was cash, and the balance due December 25th, 1848. After taking this bond, Samuel Mitchell died, and Patrick Connally, complainant's father, having become the holder of the bond for titles, took a deed from Mitchell's administrator. This deed is dated 28th day of January, 1850, and was recorded 8th day of October, 1850. The rights of Dougherty and Connally passed to complainant by inheritance. This bond for titles, and deed made under it, bound the lots on the south by the Western and Atlantic Railroad.

East of Whitehall street the use and occupancy of the right-of-way, to the width of one hundred feet, and up to the line contended for by the defendant, has been uniformly recognized by the coterminous proprietors. But west of Whitehall street the holders of the Dougherty title have uniformly asserted and maintained that the line was where complainant now contends and held possession accordingly.

The main track of the Western and Atlantic Railroad was laid along the locality in question in 1842, and for several years there was no other track there but that. After some years the Macon and Western Railroad and the Atlanta and West Point Railroad, came in on the right-of-way of the Western and Atlantic Railroad, and laid down two or three tracks each, all south of said first track, but on right-of-way as laid

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off by Armes. They ran four or five trains each per day, if not more. The Western and Atlantic Railroad had but the one main track west of Whitehall street until the shops were moved from the state square, in 1853—after that, had two sidelings laid down. None of these tracks encroached on the property claimed by complainant, except one for a short time, with her consent, her rights being then expressly acknowledged. After the Central Railroad leased the Macon and Western Railroad, it was determined, in 1872, to re-model the tracks in the yard at that point. In order to give the Central more room on the south side, the defendant determined to move its track some distance to the north, and by the plan of one of these changes, one of the sidelings, not the main track, would be on the disputed twenty feet. It was in testimony that more trains run, or have to be switched there now, than formerly, and more tracks are needed than when the road was located.

The freight depot buildings, shops, etc., were moved off the state square and off of the Samuel Mitchell lands in 1854, and located on lot number seventy-eight, and after that only the passenger business of the road was done at the state square where the union passenger depot is located. Vincent's map and Cooper's map were both put in evidence, and there was an agreement to use the originals in the supreme court, because impracticable to copy them.

The Dougherty conveyances call for two acres of land, more or less, and if complainant gets all she claims title to in this bill, she will have much less than that quantity.

The side track about being laid when the change in the tracks took place to give the Central Railroad more room, is the one sought to be enjoined by this bill. If the Macon and Western tracks and the Atlanta and West Point tracks were removed there would be room enough, and more than enough, for all purposes of the Western and Atlantic Railroad, without encroaching on the disputed ground.

There was no proof of notice to Dougherty or Connally of the deed of 1842. The court charged as follows :

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" Gentlemen of the jury : It is said in the bill that complainant is owner of a certain lot of land in the city of Atlanta, which is described in the bill, to which she holds title under Samuel Mitchell ; and that upon that land the Western and Atlantic Railroad Company has attempted to commit a trespass, and to put its tracks upon and occupy the land, and she asks the court to interfere and enjoin them from taking it. The defendant in the case says that the land on which it has entered was not the property of Mrs. Dougherty, but the property of the state of Georgia ; and that it had been leased to defendant by act of the Legislature ; that it has not passed beyond the limits of the land which the state held, and which had been conveyed to the defendant. You are to determine which is the true theory : whether the defendant, the Western and Atlantic Railroad Company, has gone upon land belonging to complainant.

" The defendant says that in 1842, Samuel Mitchell gave to the state of Georgia, for the purposes of the Western and Atlantic Railroad, a right of way for making a road or track of sufficient space or breadth to answer all convenient and necessary purposes of said road, as might be designated by the chief engineer of said state. And defendant further claims that that deed was recorded in 1849, and that subsequent to that date Mrs. Dougherty acquired her right to lots numbers twelve and thirteen ; that its right to the property in dispute was acquired by a conveyance prior in time to hers ; and that a deed made subsequently could not cover the land, which was granted under the conveyance made by Samuel Mitchell, in 1842, to the state.

" By the deed from Samuel Mitchell to the state, it was referred to the chief engineer to designate the precise parcel of land which was to pass under the deed to the state ; and you are to look to the testimony in the case and see whether he did, under this deed, designate the right of way or tract of land which, in his judgment, was necessary for the purposes of the road under this deed. If he did that, and the state, by its officers, or agents of the Western and Atlantic Railroad,

entered upon and occupied the land, or any portion of it, which was set apart by the chief engineer of the road, and held and retained it for railroad purposes, then, from the time this deed was recorded there would be notice to all parties of the extent of the claim thus made under the deed.

"I will state this again: The power of designating the precise locality of the land that was to be conveyed by deed was referred to the chief engineer of the road, and if he, in the honest discharge of his duty and exercise of his judgment, did designate such portion of that tract of land as would answer the convenient and necessary purposes of said road as a right of way, and he did that by a survey or other means; if it was thus chosen, and the road placed on that right of way, or a portion of it, and the deed was recorded, from the date of its record, it would be notice to all the world of the amount of land then taken and set apart under the deed.

"These are questions of fact for you to determine under the law. See if the testimony shows that the chief engineer, acting under authority, designated a tract or parcel of land to be taken by the state under this deed for the purposes named therein—a right of way for the state road; if he did, to what extent did it go—where does it lie? Is the property that is involved in this controversy embraced in that tract or parcel of land thus designated by him? If it is, and the conveyance made to complainant was made after the date of the record of the deed to the state, the title of the state would prevail over hers; it would be good in the state.

"If the property that has been entered on, and is in dispute, is not embraced in complainant's deed at all, she could not recover; if it does embrace it, and the road had already taken possession of it, and the deed had been recorded before hers, as hereinbefore stated, the title of the state would be paramount to hers.

"If you find that the land in dispute was not embraced in this Mitchell deed to the state; that the land set apart under that deed did not extend to and embrace the property in dispute, but that complainant's deed extends to and embraces it,

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then your verdict should be for her. If you find that the property set apart, designated by the engineer for the state road, did not extend to and embrace that in dispute, but that Mrs. Dougherty's deed did embrace it, then your verdict should be for complainant. It would be necessary, if you find for her, that you be particular and state what you find in your verdict; said premises should be described; you may designate the extent of the ground, beginning at the present building. If you see proper, you may make that the beginning point, or you may adopt such form in your verdict as you think proper, so that you distinctly locate the northern line of defendant's right of way and the southern boundary of Mrs. Dougherty's line. If you find for complainant, describe the premises and find that defendant be perpetually enjoined from encroaching on or occupying the same; if for defendant, say we find for defendant."

Under this charge, the jury found for the defendant.

The errors assigned are that the court erred in charging that the record of the defendant's deed, in 1849, enabled it to prevail over defendant's title. In charging that the survey made by Armes was a sufficient identification of the boundaries, and if the disputed track was within that survey, defendant's title would prevail. In charging that land, instead of the usufruct, passed under the state's deed; and excluding from the consideration of the jury the effect of complainant's evidence, showing possession of and dominion over the property, and acquiescence in the line claimed by her by the coterminous proprietors.

HILLYER & BROTHER, for plaintiff in error.

JULIUS L. BROWN, for defendant.

TRIPPE, Judge.

1. Without going into all the learning developed in the argument of this case, the decision of the controlling point in it may be limited to a single question: Was the boundary of

the right of way granted by Mitchell to the state, and which was designated by the chief engineer of the state, or under his authority, binding on the grantor of that right and his privies? The grant was executed in 1842. It conferred the power on the chief engineer to designate over and upon lot of land number seventy-seven, the right of way for the use and purpose of the Western and Atlantic Railroad, a great public work belonging to the state, comprising a road or track of sufficient space and breadth to answer all the convenient and necessary purposes of said road. In the same year the chief engineer, by his assistant, laid off and located under this grant the right of way for said road on said lot, one hundred feet in width. He made a chart of this survey, which was deposited in his office. At the same time, the same officer, as the agent of the grantor, surveyed and located for him a part of the lots in the city of Atlanta, on said lot seventy-seven. This survey marked out and bounded city lots twelve and thirteen, which were afterwards conveyed by Mitchell or his administrator by virtue of a bond of title given by Mitchell, to the father of complainant, whose right descended to her by inheritance. The agent of Mitchell made a map of this survey of lots twelve and thirteen, giving their southern boundary as the line of said right of way, which had been previously laid off and which is the line now claimed by defendant in error. The main track of the Western and Atlantic Railroad was shortly thereafter laid in the center of the right of way thus designated. All the city maps show the same line as the boundary between lots twelve and thirteen and the railroad. Mitchell lived more than five years afterwards, and there is no evidence of any complaint or protest on his part against the act of the engineer as the officer of the state, or as his own agent, nor was it shown that there was any abuse of authority on the part of the engineer in laying off said right of way of the width of one hundred feet. Certainly Mitchell acquiesced in this, all of which was done under his grant and by his authority. That he must have known all that was done, is a conclusion to which the evi-

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dence irresistibly forces us. His own agent, who had also acted for the state in executing the authority Mitchell himself had conferred on him, had surveyed other of Mitchell's property lying on said right of way, marked out the lots for him and made their boundary line the very line to which the right of way was so laid off, and five years thereafter, in the bond for titles which he executed to a vendee of those lots, he recited that they were bounded on the south by the Western and Atlantic Railroad. There can be no doubt of his having notice, and being bound by this action of the very agent selected by himself to act for him and for the state. As against Mitchell, the right of way thus marked out, was complete and perfect in the state. Does a purchaser from him have a right that Mitchell did not have? It is not disputed that there are cases where a vendee may be protected in asserting what his vendor cannot. But this is not one of those. It is as strong a case of a purchaser having such notice, that will charge him with the necessity of making inquiry as to the right of another, as can be found. To sustain this position, it is not necessary to notice the questions arising out of the fact that the deed to the state from Mitchell was recorded before his vendee paid all the purchase money, and took his deed from Mitchell's representative. There is another fact that controls this question against plaintiff in error. In the bond for titles made by Mitchell in 1847, when a little more than half of the purchase money was paid, as well as in the deed of his representative made in 1850, when the balance of the purchase money was paid by Connally, the holder of the bond, it was recited that the southern boundary of the two lots included in those papers, was the Western and Atlantic Railroad, in the bond for titles it is called the state railroad. At the time the bond was executed the state had a complete and perfect right against Mitchell, the vendor. Its road was already laid in the center of said right of way. A chart of the one hundred feet had been made and was in the office of the chief engineer, in the city of Atlanta. There was no other place for it to be kept. No provision of law required

its registry, so as to be notice to the world. The state also held Mitchell's grant. Complainant's own title papers gave notice to those who took them, that the limit or boundary of this great public work, so-called in Mitchell's grant and belonging to the state, was the southern boundary of what was purchased from Mitchell in 1847—the two lots, twelve and thirteen. What was the limit or boundary of that road? Could the purchaser have thought it was only the eight or ten feet covered by the road bed? If he could claim that his line went beyond the outer limit of the one hundred feet, he could just as well say it reached to the bed of the road, to the end of the cross-ties, or to the line of the embankment or excavation. No one pretends this. About twenty feet is all that is claimed. Restricting the claim to this, is an acknowledgment that the right of the road extended beyond its bed. If so, how far? If the purchaser was bound to yield to the right of the road to go outside of what it in fact covered by its bed, then he is bound by what that right actually was. Five minutes inquiry would have informed him. His vendor, the owner of lot seventy-seven, did, in fact, put it in the bond that the road ran through the lot, that the two lots he was buying were bounded by it. That vendor had made the grant to the state. He knew how far the right of the state extended. The purchaser read his bond and saw the road with its cars running over it. It is impossible to conceive that he did not make the inquiry; that he was not, in fact, informed of the exact truth, and bought with full knowledge; at least the law charges him with all this. As authorities on the principle involved in this question I refer to 19 *Georgia*, 337; 26 *Ibid*, 132; 25 *Ibid*, 55; 48 *Ibid*, 585; 22 *Maine*, 312; 4 *N. H.*, 397; 2 *Mass.*, 508; 1 *Pick.*, 174; 3 *Ibid*, 149; 2 *Ves.*, 437; 16 *Ibid*, 250; 1 *Sto. Eq.*, sec. 400; Sugden on Vendors, 1052.

2. As to the abuse of power by the chief engineer in laying off the right of way an unnecessary width, sufficient has been said to show that Mitchell was bound by the survey. He never complained. For five years he acquiesced, and, it may be said, ratified it, both in accepting the maps of lots

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twelve and thirteen from his agent, and in selling by those maps. It certainly is too late now, under all those facts, after a lapse of thirty years, to raise that question.

3. No officer of the Western and Atlantic Railroad could, by any agreement or negotiation with the purchaser, made without authority of law, bind the state. No such authority was shown giving power to such officer to make admissions recognizing title out of the state, nor does the mere fact that complainant, or any one under whom she claims, did, by the acquiescence of such officer, hold possession for awhile, or exercise dominion over a portion of the right of way, affect the state, so far as they concern the ascertainment of the true boundary thereof, or the right and title of the state to the same. That right came from the grant from Mitchell. That boundary is what the survey of the chief engineer made it. What they were, was clearly shown. No acts or agreement with unauthorized officers of the state could take either away. No statute of limitation or prescription ran against the state so as to be a bar: Code, section 2682.

4. Whether the deed from Mitchell to the state operated as a grant of the fee, or an easement only, does not affect the questions involved: Tyler on Boundaries, 111; Wash. on Easements, 3.

Judgment affirmed.

JOSEPH A. ROBERTS & COMPANY, plaintiffs in error, vs.
THOMAS A. BARROW *et al.*, defendants in error.

Plaintiffs informed the defendants that they held a note on a firm in which the latter had been partners. In fact, the note was given by one of the members of said firm after dissolution, but for goods purchased before. On the 3d of May, 1871, the defendants forwarded to plaintiffs their note due at seven months, and on the sixth of the same month the latter returned the note held by them signed by C. in liquidation for C. K. & Co. Nothing further appears to have been done until February 28th, 1872, when the defendants notified the plaintiffs that their note would not be paid, as it was obtained by fraud. Upon this statement of

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facts the court erred in not charging the jury that if the defendants, after a full knowledge of the fact that C. had signed the copartnership name to the note of 16th of May, 1868, in liquidation of the account due by the firm, for which the note of the defendants was given, did not, within a reasonable time thereafter, return the note to the plaintiffs, and repudiate the act of C. in signing it for the firm, then they would in law be held to have ratified the act of signing by their silence and acquiescence, and could not afterwards allege that the note given by them was obtained by the fraud of the plaintiffs.

Principal and agent. Partnership. Before Judge KIDDOO. Decatur Superior Court. May Term, 1874.

For the facts of this case, see the decision.

FLEMING & RUTHERFORD, for plaintiffs in error.

McGILL & ONEAL; B. B. BOWER, for defendants.

WARNER, Chief Justice.

The plaintiffs brought an action against the defendants on a promissory note for \$286 75, payable to themselves, dated 3d of May, 1871, and due seven months after date. To this action the defendants pleaded that the note was improperly obtained from them by a misrepresentation of facts on the part of the plaintiffs, in this, that the plaintiffs wrote to defendants that they held a note against the firm of Christian, Kennedy & Company, of which the defendants had been members, and believing that the note had been given to the plaintiffs by some member of the firm of Christian, Kennedy & Company during the existence of said partnership, and that they were bound to pay it, and only learning to the contrary thereof when the note for which the one now sued on was given was returned to them by plaintiffs, when they discovered that the note represented to have been given by Christian, Kennedy & Company, was executed by Christian, alone, after the dissolution of the copartnership, when he had no authority to bind the firm; that at the date of the note given by Christian to the plaintiffs he was entirely solvent, and remained so for more than two years; that plaintiffs never wrote to de-

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defendants requesting the payment of the note, which they said they held on the firm of Christian, Kennedy & Company until after Christian became insolvent, etc. On the trial, the correspondence between the parties and other evidence was introduced, and the jury found a verdict for the defendants. A motion was made for a new trial on the several grounds set forth in the motion, which was overruled, and the plaintiffs excepted.

The note, for which the one now sued on was given, was signed by Henry R. Christian, in liquidation for Christian, Kennedy & Company, and dated 16th May, 1868. On the 1st of June, 1870, the plaintiffs informed the defendants, by letter, that they held a note on Christian, Kennedy & Company for \$235 79, and urged payment thereof. Several letters were written by the respective parties, the plaintiffs requesting the payment of the claim, the defendants promising to settle it as soon as they could obtain the money, and asking indulgence, saying they would give their note for the amount due next December, which is the note sued on, dated 3d May, 1871, and due seven months after date. On the receipt of the defendants' note by plaintiffs, they, on the 6th of May, 1871, returned them the note signed by Henry R. Christian, in liquidation for Christian, Kennedy & Company. There is no doubt that the firm of Christian, Kennedy & Company purchased the goods of the plaintiffs, for which the note signed by Christian, for Christian, Kennedy & Company, was given, and had not paid for the same.

The defense set up is, that at the time Christian executed that note in liquidation of the plaintiffs' account, the firm had been dissolved, and he had no legal authority to sign the firm name; that he was not then the agent of the other partners, and could not bind them by signing the firm name to the note in liquidation of an account which the firm justly owed. By the law of this state, after the dissolution of a copartnership, one partner has no power to bind the firm by a new contract, or to revive one already for any cause extinct, or to renew, or continue an existing liability, or change its dignity, or its

nature : Code, 1917. So long as the copartnership continues, each partner is the agent of the other partners in relation to the business of the copartnership, and will be bound by his acts. Although at the time Christian executed the note to the plaintiffs, for the firm of Christian, Kennedy & Company, for a debt due by the firm to them, the copartnership was in fact dissolved, still, it was competent for the other partners to ratify his act in signing the copartnership name to the note, and they would be bound by such ratification. Did the defendants by their conduct, after a full knowledge that Christian had signed the copartnership name to the note in question, repudiate his act, or did they, by their silence, and conduct ratify it so far as to estop them from setting up the defense now relied on to the note in suit? What did they do in relation to the matter? In May, 1871, the note signed by Christian for the firm, was forwarded to them ; they knew the facts then. It is true they had given their note to the plaintiffs, but did they return the note promptly to the plaintiffs, and repudiate the transaction, as it was their duty to have done if they intended to disavow his authority to bind the firm by the giving the note in liquidation of the account they justly owed. They did nothing of the kind, but on the contrary, after receiving the note in May, they remained silent, acquiesced in what they knew Christian had done, retained the note in their possession until the plaintiffs' account was barred by the statute of limitations, and then, on the 26th of February, 1872, after the expirations of ten months, instructed their attorney to inform the plaintiffs that the note given by them would not be paid, as the same was obtained through fraud. If Christian had no authority, as the agent of the other partners, to bind them by signing the note in question after the dissolution of the partnership, still, if they acquiesced and remained silent after full knowledge of the facts, and retained the note so signed and forwarded to them by the plaintiffs, in exchange for the note given by them, they will in law be considered as having ratified the giving of the note by Christian in the copartnership name for a debt justly due by the firm. The rat-

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ification of the unauthorized act of an agent, may be implied under certain circumstances, from the silence of the principal: 14 *Georgia Reports*, 124; 39 *Ibid.*, 586; Code, section, 2192. In view of the facts of this case, the court, in our judgment, erred in not charging the jury that if the defendants, after a full knowledge of the fact that Christian had signed the co-partnership name to the note of 16th of May, 1868, in liquidation of the account due by the firm, for which the note of the defendants was given, did not, within a reasonable time thereafter, return the note to the plaintiffs, and repudiate the act of Christian in signing it for the firm, then they would in law be held to have ratified the act of Christian in signing it, by their silence and acquiescence, and could not afterwards allege that the note given by them was obtained by the fraud of the plaintiffs.

Let the judgment of the court below be reversed.

JAMES B. ARTOPE, trustee, *et al.*, plaintiffs in error, vs. WILLIAM P. GOODALL, executor, defendant in error.

1. Where a marriage contract secured the wife's property through a trustee to her separate use, free from the power or control or any liability for the debts of her intended husband, the profits or income accruing from said property belongs exclusively to the wife, and does not become, in any event, a part of the *corpus* of the trust fund, in which a remainder is created, unless some provision is made therefor.
2. If other property be purchased with such income, and title thereto is taken to the trustee for the wife, and especially if the husband is cognizant of it, her right to the same may be protected against the marital rights of the husband, although no technical words creating a separate estate in her are contained in the deed.
3. If proof of payment with such income, goes to the jury without objection, it may be considered by them in making their verdict, although there be no allegations in the pleadings setting up such facts. But such proof, or proof of the further fact that the scrivener who drew the deed did not follow instructions in drafting it, is not admissible over objections unless the pleadings authorize it.
4. If a trustee in whom the legal title is vested, brings suit for real property, and the *cestui que trust*, who is a married woman, die *pendente*

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- lite*, and there is no administration on her estate, the action does not abate, but may be continued for the recovery of the property for her heirs. If the action be for personal property, the trustee may recover so that he may be able to deliver it to the administrator, if one be appointed, or if there be no necessity for administration, then to the distributees, subject in either case to all charges to which it may be liable.
5. Purchasers who do not claim under the husband, cannot set up his marital rights in order to protect their title against the rights of the wife in such property as is specified in the second point of this syllabus, if the husband himself could not so assert them.
 6. Where a deed was made to a third party, trustee for a married woman, which does not create a separate estate in the wife, the property *prima facie* becomes the property of the husband, and *bona fide* purchasers who claim under him without notice of any equity of the wife in the property, hold a good title, although they may have never seen such deed.
 7. When a witness has been impeached by proof of general bad character, one who is called to sustain him should, if not able to say that his general character is not bad, at least be required to state that it is not such as to render him unworthy of credit on his oath, and that, from this character, the sustaining witness would believe him on his oath.

Trusts. Husband and wife. Marriage contract. Evidence. Vendor and purchaser. Deeds. Witness. Before Judge HERSCHEL V. JOHNSON. Bibb Superior Court. October Term, 1873.

This is the third time this litigation has been before this court: See 42 *Georgia Reports*, 95, and 48 *Ibid.*, 537.

This was ejectment for part of lot number fifteen, in the western range of two acre lots in the city of Macon, by Doe upon the demises of J. B. Artope, as trustee of Mrs. Elizabeth W. McLaughlin, (made party instead of George M. Logan, former trustee, who died *pendente lite*,) and of Georgia, Emma, Alexander and Charles J. McLaughlin, children of said Elizabeth, against Roe, casual ejector, and William P. Goodall, as executor of Robert P. McEvoy, tenant in possession. The defenses were not guilty, title by prescription and an equitable plea.

Plaintiff gave in evidence a marriage settlement made in Richmond county, Georgia, on the 28th December, 1830, be-

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tween Alexander R. McLaughlin, of Bibb county, Elizabeth W. Bugg, of Richmond county, and John T. Lamar, of Bibb county, signed by the three, recorded in Richmond county, on March 22d, 1831, and in Bibb county on the 2d February, 1870.

This marriage settlement is set out in full in 42 *Georgia*, page 97. John T. Lamar died in 1842. On petition of Mrs. McLaughlin and her children, George M. Logan was, on the 16th of April, 1869, by the chancellor of Bibb county, duly appointed trustee to succeed said John T. Lamar, with his powers, rights and duties, as set forth in said papers, and Logan accepted the trust. Logan died pending this suit, and Artope was appointed in his stead.

Plaintiffs next read in evidence a lease made the 11th of July, 1836, by the mayor and council of Macon to John T. Lamar, as trustee for Mrs. McLaughlin, embracing the premises in dispute, recorded February 1st, 1870, (a copy of which is set out in 42 *Georgia*, page 99.)

Several witnesses were introduced by both plaintiff and defendant, in connection with other testimony, but the following facts are sufficient for a clear understanding of the points decided. The marriage settlement secured to Mrs. McLaughlin, through a trustee, her property to her separate use, free from the power or control or liability for the debts of her husband. The evidence showed that the property in dispute had been purchased with the hire of the negroes embraced in the said marriage settlement, and with other trust funds.

The lease from the city of Macon to John T. Lamar, trustee for Mrs. McLaughlin, contained no words of separate use. This instrument had been lost for twenty years, and only found a short time before the bringing of this suit.

Mrs. McLaughlin died before the trial of this case, and there was no administrator upon her estate. The defendant introduced a deed to the premises from A. R. McLaughlin, (husband of Mrs. McLaughlin,) to White & McLaughlin, co-partners, consideration, one dollar, dated May 23d, 1843, and duly recorded. A deed from the sheriff of Bibb to Thomas

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A. Brown, dated March 6th, 1849, the lot being sold as White's property. A deed from Thomas A. Brown to Joseph A. White, dated January 10th, 1851, being a quit claim. A deed from Joseph A. White to Edward L. Strohecker to one-half interest in lot number fifteen, dated July 1st, 1852. A deed from R. F. Baldwin, as executor of Joseph A. White, to Thomas Stubbs, to one-half undivided interest in lot number fifteen, dated March 15th, 1855. A deed from Thomas Stubbs to J. A. Ralston covering one undivided half of lot number fifteen, dated June 6th, 1859. A deed from J. A. Ralston to Edward L. Strohecker to west half of lot number fifteen, dated October 23d, 1860. A deed from Edward L. Strohecker to William P. Goodall as executor of McEvoy, dated 24th September, 1872.

There were several witnesses introduced for the purpose of impeaching Alexander R. McLaughlin, introduced by the plaintiff. Strohecker, Goodall and others, testified that at the time they purchased they had no knowledge or notice of Mrs. McLaughlin's equity, or that the property in dispute was her trust property, or that her money paid for it.

The jury found for the defendant. Plaintiff's counsel moved for a new trial upon the following grounds, among others:

1st. Because the court erred in refusing to allow A. R. McLaughlin to testify what instructions were given to the city officials as to the person to whom the lease was to be made, and that there was a mistake in leaving out a part of those instructions.

2d. Because the court erred in refusing to allow James M. Jones (a witness introduced to sustain A. R. McLaughlin,) to be asked if he would believe the said McLaughlin upon his oath—Jones having stated that McLaughlin's general character had been exemplary in some things, and in others not, but that he did not know the general opinion of the people about him.

3d. Because the court erred in charging as follows: "That the deed from McLaughlin to White & McLaughlin was recorded, and so was the deed from White to Strohecker.

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This was constructive notice to Strohecker that title was in White. It is true that a purchaser is bound to look to his title, and he buys at his peril as against the true owner, and he is not a *bona fide* purchaser, if by ordinary diligence he could have ascertained the true owner. But if the true owner has his deed concealed or lost by his own act, so that the purchaser could not by such diligence ascertain who the true owner was, and the true owner stands by knowing of his purchase, and permits him to go on and make improvements, he cannot set up the want of *bona fides* against such purchaser. Therefore, if you believe from the evidence that Mr. and Mrs. McLaughlin concealed the lease deed for a long series of years, embracing the period in which these various purchases were made, so that it was impossible for them to have seen it, and McLaughlin, with the knowledge and acquiescence of Mrs. McLaughlin, claimed the land and treated it as his own, then it does not lie in the mouth of these plaintiffs to set up the want of *bona fides* on the part of purchasers claiming title under McLaughlin."

4th. Because the court erred in charging as follows: "If the property in dispute was purchased with the hire of the negroes mentioned in the marriage settlement, that under the terms of that settlement, the hire of the negroes became the individual property of Mrs. McLaughlin, and when the hire was so invested in the land in dispute, then the land became the individual property of Mrs. McLaughlin—not covered by the trust—and at her death belonged to her separate estate, and can only be recovered by her administrator, and there being no demise in the name of her administrator, the plaintiff cannot recover in this suit."

The motion was overruled, and plaintiffs excepted.

J. & J. C. RUTHFORD, for plaintiffs in error.

WHITTLE & GUSTIN; LANIER & ANDERSON, for defendant.

TRIPPE, Judge.

1. It was claimed in the argument before this court that the profits or increase of the trust estate became a part of the *corpus* of that estate, and by the terms of the deed would go to the remaindermen. It was not so provided in the deed, which was the marriage contract. By that, a separate estate was created in the wife, free from the control of the husband, and at her death the property, not the income, was to go to the children if the wife died intestate. Unless a provision was made therefor we know of no authority that would authorize the construction of such terms to be that the remainder interest included the income or profits. That belonged exclusively to the wife.

2. Previous to the adoption of the Code the mere creation of a trust, without anything to show that a separate estate was intended for the wife, did not exclude the marital rights of the husband. But if such trust property be purchased with the income of the other property in which the wife has a separate estate, as in the case of the deed "to Lamar, trustee for Mrs. McLaughlin," she could claim its protection against the marital rights of her husband, and purchasers from him, with notice. It was stated in *Logan vs. Goodall*, 42 *Georgia*, 95, which was this case in the name of another plaintiff, that by the terms of the marriage contract the intended husband bargained and agreed that any property she might thereafter become entitled to in any manner whatever, should be free from his marital rights, and that he was thereby estopped from setting them up.

3. It has often been held by this court, that if proof goes to the jury without objection, which would show a right in the party offering it, the jury may consider it, although there are no allegations in the pleadings setting up the facts thus proved. This is put upon the ground that if objection be made that the pleadings do not authorize the testimony, the party tendering it might amend so as to make it admissible. See 39 *Georgia*, 708; 49 *Ibid.*, 268.

4. The principle asserted in the fourth point of the syllabus we consider was virtually decided in this case when it was here before: 48 *Georgia*, 537. As was asked in that decision, what injury can result to anybody by letting this case, which has undergone a protracted and costly litigation, be continued for the benefit of those who may now be entitled to the property? We do not say they are; but why not let them adopt the case and have their rights determined? If any *mesne* profits should be the separate estate of Mrs. McLaughlin, or if any special direction be necessary to be given to any particular portion of it, under the broad powers given to a court of law, the verdict can be moulded to meet the exigency.

5. As to one-half of the lot of land in controversy no one claims the title thereto under the husband. It can, therefore, be of no interest to any claimant as to what his marital rights may have been, so far as that half is concerned.

6. The deed to Lamar, trustee, etc., *prima facie* put the title in McLaughlin, the husband. Purchasers from him had the right to treat him as the true owner, if they had no notice of the equitable rights of the wife. And this is true, whether or not such purchasers had ever seen such deed. Because a purchaser was ignorant of a fact or a deed which makes his title good, he cannot be denied the right to set up such a fact, or such a deed in support of his title. One who bought of McLaughlin, or of a purchaser under him, is to be assumed as believing he had the title, if nothing appears to the contrary. If on subsequent examination such purchaser discovers there was a deed which on its face did vest the title in his vendor, and which would protect his own title, it would be absurd to hold that it should be of no avail, simply because he did not examine before he bought and see that he did, in fact, get a good title.

7. Upon the question as to how far a witness called to sustain another who has been impeached by proof of general bad character, should be required to go in stating his knowledge of the general character of the impeached witness, before he can answer the final question put in such cases, it is almost

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impossible to prescribe by a specific rule, what exact terms the sustaining witness should use. To impeach a witness by proof of general bad character, the impeaching witness should be first asked as to his knowledge of the general character of the witness, and next as to what that character is, and lastly, he may be asked if, from that character, he would believe him on his oath : Code, section 3873. "The witness may be sustained by similar proof of character:" Section 3874. We think that under these sections, if the sustaining witness is not able to say that the general character of the impeached witness is not bad, he should, at least, be required to state that it is not such as to render him unworthy of credit on his oath, before he can give his own declaration, that from this character he would believe the other on his oath. This would meet all the difficulty presented in this case, and probably any that would arise in any other.

Judgment reversed.

AARON ARNOLD, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

The evidence being sufficient to sustain the verdict a new trial will not be ordered.

New trial. Before Judge HOPKINS. Fulton Superior Court. October Term, 1873.

The facts necessary to an understanding of this case are embraced in the decision.

A. B. CULBERSON ; W. F. WRIGHT, for plaintiff in error.

JOHN T. GLENN, solicitor general, for the state.

WARNER, Chief Justice.

The defendant was indicted for the offense of an assault with intent to murder, and on the trial thereof the jury re-

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turned a verdict of guilty. A motion was made for a new trial which was overruled by the court, and the defendant excepted. The grounds of the motion were, because the verdict was contrary to law, contrary to the evidence, and strongly and decidedly against the weight of the evidence, and because the evidence of the identity of the defendant was too vague and uncertain, and because there was sufficient evidence of an *alibi* to create a reasonable doubt in the minds of the jury as to the guilt of the defendant. In looking through the evidence contained in the record of this case it is quite sufficient to sustain the verdict according to the repeated rulings of this court, therefore, the verdict is not contrary to law nor was it contrary to the evidence, or so strongly and decidedly against the weight of the evidence as would have required the court below to have set it aside. As to the identity of the defendant, that was a question for the jury, under the evidence. Whether the evidence as to the *alibi* of the defendant was sufficient to create a reasonable doubt in the minds of the jury as to the defendant's guilt, was also a question exclusively for the consideration of the jury.

Let the judgment of the court below be affirmed.

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ANTHONY CARTER, plaintiff in error, vs. THE STATE OF
GEORGIA, defendant in error.

Where an indictment charges that the defendant was entrusted by the owner with certain melons, "for the purpose of applying the same to the sole use and benefit of the said owner," a verdict of guilty is not sustained by proof that the melons were delivered to the defendant for the purpose of selling the same and bringing the money to the owner, less what he charged for his services.

Criminal law. Larceny after trust. Before Judge SCHLEY.
Chatham Superior Court. February Term, 1874.

Anthony Carter was indicted for the offense of larceny after a trust delegated, in this, that he "was entrusted by one John

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Mongin with four hundred and eighty melons of the value of ten cents each, the property of the said John Mongin, for the purpose of applying the same to the sole use and behoof of the said John Mongin." And, "after having been entrusted as aforesaid, failed to apply the article aforesaid as directed, but wrongfully, feloniously, fraudulently, and without the consent of the owner thereof, appropriated the same to his own use, without paying to the owner thereof the full value or market price thereof."

The evidence for the state disclosed that the melons were delivered by Mongin to the defendant to be sold for him, the proceeds to be paid to Mongin, less what the defendant charged for his services; that the melons were of the value charged and that the defendant paid but one dollar to Mongin.

The evidence for the defendant is omitted as unnecessary to an understanding of the decision. The jury found a verdict of guilty. The defendant moved for a new trial because the verdict was contrary to the law and the testimony. The motion was overruled and defendant excepted.

DANIEL R. GROOVER, by CHARLES D. HILL, for plaintiff in error.

ALBERT R. LAMAR, solicitor general, for the state.

TRIPPE, Judge.

The statute makes the fraudulent conversion by a bailee of many kinds of property a criminal act, to-wit: money, notes, bonds, cotton, corn, horses, mules, etc. If the indictment charged that the defendant was entrusted with money, or a horse, which he fraudulently converted, it could not be sustained by proof that a bond, or cotton, had been so entrusted and converted. So the same statute, Code section 4424, prescribes that when such things or articles have been entrusted to a person for divers different purposes, to be used by him in various specified ways therein defined, and the bailee shall fraudulently convert them to his own use, or other-

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wise dispose of them, he shall, on conviction, be punished. It is as much necessary that the character of the bailment, the purpose for which the thing is entrusted, shall be set forth in the indictment, as it is properly to describe the thing or *article* itself. In both cases the rule is founded on the right of a party to have notice of what it is proposed to convict him. We do not suppose that any indictment under this statute ever failed to define both, to-wit: the article deposited and the nature or object of the bailment. Each of them is set forth in the one under consideration. The bailment therein defined, is that the melons were entrusted by the owner with the defendant, "for the purpose of applying the same to the sole use and benefit of the said owner." The proof was that they were delivered to the defendant for the purpose of selling the same, and after the defendant was satisfied out of the proceeds of sale for his services, the surplus was to be paid to the owner. Where the bailee is charged with a trust to be executed in a special mode distinctly defined when it is created, and is to be brought to account for an alleged breach thereof, either civilly or criminally, he should be notified in the suit or the criminal accusation, of what *trust* it is claimed he has been guilty of violating. We think justice and reason demand this, and that it is but preserving a vital rule that obtains in all pleadings, civil or criminal.

Judgment reversed.

LUTHER HAYS, plaintiff in error, vs. JOHN G. REYNOLDS, executor, defendant in error.

Four years possession of land, after a judgment of foreclosure of a mortgage thereon, by a *bona fide* purchaser thereof, does not discharge the same from the lien of such judgment, under section 3583 of the Code.

Vendor and purchaser. Mortgage. Judgment. Before Judge HALL. Newton Superior Court. September Term, 1873.

For the facts of this case, see the decision.

FLOYD & MIDDLEBROOKS, for plaintiff in error.

SIMS & SIMS, for defendant.

WARNER, Chief Justice.

This was a claim case. The land was levied on to satisfy a mortgage lien under a judgment of foreclosure thereof. On the trial of the claim, the jury, under the charge of the court, found the property subject to the mortgage. A motion was made for a new trial on the ground of error in the charge of the court to the jury, which was overruled, and the claimant excepted. The only question made in the record for our judgment is, whether the claimant was protected in his four years possession of the land as a *bona fide* purchaser thereof for a valuable consideration, as against the lien of the mortgage, when there had been a judgment of foreclosure of the mortgage. In other words, are judgments foreclosing mortgage liens within the provisions of the 3583d section of the Code, which declares: "When any person has *bona fide*, and for a valuable consideration, purchased real or personal property, and has been in the possession of such real property for four years, or of such personal property two years, the same shall be discharged from the lien of any judgment against the person from whom he purchased."

The court charged the jury that a judgment foreclosing a mortgage lien was not within the true intent and meaning of that section of the Code, and that is the alleged error complained of in this case. The lien of a mortgage is created by the act of the parties and not by the judgment of the court foreclosing it. The judgment of foreclosure only bars the mortgagor's equity of redemption of the specific property contained in the mortgage. The judgment of foreclosure authorizes the sale of the thing or specific property mortgaged, in satisfaction of the lien created by the mortgage, and that is all; it binds no other property of the mortgagor. The due record of a mort-

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gage is notice from the time of record to all the world: Code, 1960. It will be noticed that the 3583d section declares that four years possession of the real property by the purchaser shall discharge it from the lien of any judgment against the person from whom he purchased. A judgment of foreclosure of a mortgage, is not a judgment against *the person* of the mortgagor, but is only a judgment against the thing or property mortgaged, and not being a judgment against *the person* from whom the claimant purchased the land, it is not within the 3583d section of the Code. In *Butt vs. Muddox*, 7th *Georgia Reports*, 495, it was held that judgments on the foreclosure of mortgages, were not within the dormant judgment of 1823, and one of the reasons given for the judgment of the court in that case was, that the lien of the mortgage was created by the contract of the parties and not by the judgment of a court. This ruling of the court was affirmed in *Horton vs. Clark*, 40 *Georgia Reports*, 412.

Let the judgment of the court below be affirmed.

EDWIN W. MARSH, plaintiff in error, *vs.* HENRY GRIFFIN,
defendant in error.

One who buys land on which the lien of a judgment against the vendor has attached and which is subsequently sold by the sheriff under the judgment, cannot tack the time he was in possession prior to the levy to the time that elapses from the sale to the bringing of ejectment by the purchaser at sheriff's sale, so as to claim that the two periods when added will make out a title by prescription.

Prescription. Judgment. Possession. Before Judge UNDERWOOD. February Adjourned Term, 1874.

On April 9th, 1873, Marsh brought complaint against Griffin for lot of land one hundred and eighty-six, in the twelfth district and fourth section of said county. The defendant pleaded the general issue and title by prescription.

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Upon the trial the following facts were admitted: On February 24th, 1862, Marsh obtained a judgment against one John Hatfield, upon which execution issued on October 1st, 1867. On the 28th of the month last aforesaid, a levy was made upon the land in controversy, and a sale had on the first Tuesday in the following December. Marsh became the purchaser, taking a sheriff's deed therefor.

On December 29th, 1862, Hatfield, for and in consideration of \$800 00 paid, conveyed said lot to Alexander Martin, who went into possession the following fall, and so remained until August 20th, 1872. On the day last aforesaid, Martin, for a valuable consideration, conveyed to the defendant Griffin, who immediately went into possession, and has so remained from that time.

The court charged the jury that upon the facts, as stated, the plaintiff was not entitled to recover, and a verdict was rendered accordingly.

Exception was taken to the aforesaid charge, and error is assigned thereon.

DABNEY & FOCHE; J. C. CLEMENTS, for plaintiff in error.

WARREN AKIN, for defendant.

TRIPPE, Judge.

The simple question made in this case is, can one who buys land on which the lien of a judgment against the vendor has attached, and which is subsequently sold by the sheriff under the judgment, tack the time he was in possession prior to the levy to the time that elapses from the sheriff's sale to the bringing of ejectment by the purchaser thereat, so as to claim that the two periods, when added, will make out a title by prescription? The court below held that he could. We cannot concur with this construction of the statute in relation to the matter of title by prescription. It is true that it is specially provided that if a *bona fide* purchaser of land re-

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mains in possession of it four years, he then holds it discharged from the lien of any judgment against his vendor: Code, section 3583 But this is not on the ground of adverse possession in the purchaser. Not one word is used in the section referring to the character of the possession. The purchaser may admit every day of the four years after his purchase, that his land is subject to the lien of the judgment, and that it could be enforced against it, and his right be none the less, after the expiration of four years, to assert that the land is then discharged from all right in the plaintiff in the judgment to claim any lien upon it. But if before that lien is lost the land is levied on and sold, the previous possession of the person who had bought from the defendant can no longer be of any avail to him as against the purchaser at sheriff's sale. Time may have been running in his favor down to the levy, so far as concerned the lien of the judgment. But when the land is sold by the sheriff under the judgment, the relation of the parties is changed. It then becomes a question of title—of contesting titles, one in the purchaser from the defendant in the judgment—and the other in the purchaser at sheriff's sale. It cannot be claimed that the possession of the first was adverse as to the latter. If, in a loose sense, it was adverse to the lien of the judgment, that was determined when the land was levied on and sold.

The provisions of the Code upon the subject of title by prescription do not apply to such a case. They were not intended to affect the question of the lien of judgments. If the holder of such a lien enforces it, before it is lost under section 3583, whatever new right he may acquire by purchasing at a sale thus had, or the right of a third person who may be the purchaser, is unaffected, by the time that may have elapsed between the time of a sale made by the defendant in the judgment, and the time when the judgment is enforced by levy and sale by the sheriff.

Judgment reversed.

Perdue *vs.* Bailey.

D. W. PERDUE, plaintiff in error, *vs.* SAMUEL BAILEY, defendant in error.

Where the verdict was contrary to a legal charge, a new trial should be granted.

New trial. Charge of Court. Before Judge HALL. Pike Superior Court. April Term, 1874.

For the facts, see the decision.

L. T. DOYAL; BOYNTON & DISMUKE, for plaintiff in error.

SPEER & STEWART, for defendant.

WARNER, Chief Justice.

The plaintiff brought an action against the defendant on a promissory note for \$228 00. The record does not show that the defendant filed any plea to the action, but on the trial the defendant offered evidence going to show that the note was given to the plaintiff in ignorance of his legal rights, and that the same was without consideration. This evidence appears to have been introduced without objection. The jury found a verdict in favor of the plaintiff for three dollars only. A motion was made for a new trial by the plaintiff, on the ground that the verdict was contrary to the evidence and without evidence to support it, and contrary to the charge of the court. The court sustained the motion, and granted a new trial whereupon the defendant excepted. It does not appear from the bill of exceptions as certified by the presiding judge, what the court did charge the jury, and the defendant did not except to the charge of the court. Assuming that the court charged the law correctly, in the absence of all knowledge as to what it did charge, and the court having granted a new trial on the ground that the verdict was contrary to its charge, we will not interfere with the discretion of the court in granting the new trial on the statement of facts as now presented in the record before us, but we express no opinion as to the merits of the

rights of the respective parties under the evidence offered at the trial.

Let the judgment of the court below be affirmed.

LEWIS H. EDWARDS, plaintiff in error, vs. JOHN L. DIXON, administrator, *et al.*, defendants in error.

Paragraph 2, section 17, article 5th, of the constitution of 1868, casting the burden of proof upon the plaintiff in certain cases, in so far as it applies to ordinary contracts between individuals, as in the case of a payee of a promissory note suing the maker, and in so far as it may require the plaintiff in such a case to prove that the consideration of the note was a legal and valid one, is not in violation of that provision in the constitution of the United States which prohibits a state from passing any law impairing the obligation of contracts.

WARNER, Chief Justice, dissented.

Constitutional law. Pleadings. Before Judge BARTLETT. Meriwether Superior Court. May Term, 1874.

This case was before the court in 48 *Georgia Reports*, 142. Any further report of it than is contained in the opinions is unnecessary.

A. H. FREEMAN, for plaintiff in error.

GEORGE L. PEAVY; JOHN W. PARK, for defendants.

TRIPPE, Judge.

In the judgment rendered in this case I propose, as indicated in the head-note, to limit it to the exact case as is made in the record and to the principle involved in said head-note. The suit was brought by the payee of the note. It is an ordinary contract, and there could be no difficulty in proving the consideration of it. No impracticable rule is set up by the constitution which this plaintiff is required to comply with. No burden is imposed on him greater than what has been or may

be done without question by the legislature in many other cases. If an act were passed, requiring that when a defendant files under oath a plea of failure of consideration to a suit on a note, the plaintiff must support his case by proving the consideration, would it be claimed that it was an unconstitutional law, that it impaired the obligation of a contract, that it so broke in upon the remedy of the plaintiff as to violate the paramount law of the land? So if a similar *onus* was put upon a plaintiff, where the plea of gaming or of usury, or other illegality, is set up, would such a statute be void? The rule now is in a claim case, that where the property levied on is shown to have been in the possession of the defendant in execution after judgment was obtained, the *onus* is cast on the claimant. If it were declared by statute that when an affidavit is filed by a plaintiff in execution before levy is made, that such property was in his debtor's possession after judgment, it should be sufficient to cast the *onus*, would such an act be unconstitutional?

Let it be noted that the provision of the constitution under consideration does not create a defense—does not make anything or act an avoidance of a contract which was not a defense before, which would not have been sufficient to set it aside or avoid it when the constitution was adopted: *Chancellor vs. Baily*, 37 *Georgia*, 532; *Wallace vs. Cannon*, 38 *Ibid.*, 199. Were that matter a new question, *res integra*, and did I not feel bound by those decisions, as well as several rendered by the supreme court of the United States, my own judgment might be different in this case, but for a totally different reason than the one given in the dissenting opinion. The constitution does not make the filing of the plea, nor the swearing to it, nor both together, a ground for a judgment in defendant's favor. It simply casts a certain duty on the plaintiff in such a case, the sum of which is that he must show a legal and valid consideration for the contract he himself made and on which he has brought suit. He knows what that consideration is; can it be unconstitutional to require him to prove it? Again, it is not a case of a bearer of a negotia-

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ble instrument suing on a paper which may have been in the hands of numerous parties—parties whom the present bearer may not and cannot know ever held it. Nor is it like the case of the holder of a bank-bill, when it is almost universally impossible for him to know to whom it was issued, or how often it has been issued, or the thousand different uses to which it may have been put. There is overwhelming reason for saying that to require a holder of such a paper to show all that, would be to burden him with the necessity of doing what it is impossible to do—would impose upon him impracticable conditions, and practically deny all right of recovery. For such a reason, I concurred in the judgment rendered in *Dobbins vs. Sibley*, and *Branch vs. Baker*, decided at the present term. The difference between the two classes of cases, is manifest at once. In one, a clear, substantial remedy is left to the suitor; in the other, all remedy is practically taken away. I repeat, that I do not intend in this to go outside of the question as it is presented by the facts of this case, and only pronounce that, in my opinion, the said provision of the constitution, article 5, section 17, paragraph 2, casting the burden of proof in certain cases upon the plaintiff, in so far as it applies to ordinary contracts, as in the case of a payee of a promissory note suing the maker, and in so far as it requires the plaintiff in such a case to prove that the consideration of his note was a legal and valid one, is not in violation of that provision of the constitution of the United States which prohibits a state from passing any law impairing the obligation of contracts.

Judgment affirmed.

MCCAY, Judge, concurred, but furnished no written opinion.

WARNER, Chief Justice, dissenting.

When this case was before this court on a former occasion, the constitutional question was not then made or discussed, and as a matter of course, no opinion was expressed in rela-

tion thereto, but the constitutional question was raised and decided in the court below on the last trial, and now comes before us for decision upon that point in the case. The plaintiff read in evidence his note, dated in August, 1861, and closed. The defendant having filed a plea under the provision of the 17th section of the 5th article of the constitution of 1868, and without offering any evidence, moved the court to non-suit the plaintiff, which motion the court sustained, and the plaintiff excepted. In my judgment, that part of the state constitution of 1868 which declares "that in all cases when the defendant, or any one interested in the event of the suit, will make a plea supported by his or her affidavit, that he or she has reason to believe that the obligation or evidence of indebtedness upon which the suit is predicated, or some part thereof, has been given or used for the illegal purpose aforesaid, (that is, for the purpose of aiding and encouraging the rebellion) the burden of proof shall be upon the plaintiff to satisfy the court and jury that the bond, deed, note, bill or other evidence of indebtedness upon which said suit is brought, is or are not, nor is any part thereof, founded upon, or in any way connected with, such illegal contract, and has not been used in aid of the rebellion," is in violation of the 10th section of the 1st article of the constitution of the United States, which prohibits the state from passing any law impairing the obligation of contracts, and is, therefore, void as to contracts made prior to its adoption as the law of this state. It makes the plea of the defendant, supported by his affidavit, a defense to the plaintiff's action to enforce his contract, which was not a defense to it under the then existing laws of the state, at the time the contract was made, and if one of the original contracting parties be dead, (as in this case,) the plaintiff would be deprived of all remedy under the statute law of this state, to enforce his contract, unless he could *negative* the defendant's plea by other evidence than his own testimony. It is competent for the state to alter and change the rules of evidence in relation to contracts, and the remedy for their enforcement, provided, always, that no substantial right secured

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by the contract is invaded or impaired. A law of the state made under the *pretext* of altering the remedy on contracts, or for altering the rules of evidence in relation thereto, may as well be in violation of the constitution as any other law of the state when it *invades* and *impairs* the obligation of existing contracts. The name or pretext under which it is done, is wholly immaterial. The laws of the state which are in existence at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, and the parties will be presumed to have contracted in view of that existing law, and this embraces alike those laws which affect its validity, construction, discharge and *enforcement*. The provision of the state constitution of 1868, as applicable to the plaintiff's contract, made prior to its adoption, hinders and obstructs its *enforcement*, and necessarily impairs its obligation, as that obligation existed at the time the contract was made. Any impairment of the obligation of the plaintiff's contract, as that obligation existed under the law at the time it was made, the degree of impairment is immaterial, is within the prohibition of the constitution of the United States. The practical effect of the defendant's plea under this law of the state is to make the fact that he has *reason to believe* that the plaintiff's note, or some part thereof, has been given or used for the purpose of aiding the rebellion, (without stating what that reason is on which his belief is founded) a complete defense and discharge of the defendant's obligation to perform his contract, unless the plaintiff shall be able to satisfy the court and jury to the contrary thereof by proving a *negative*—that is to say, that the note, or any part thereof, was *not* given and has *not* been used for the purpose of aiding the rebellion, or in any way connected therewith. The existing law of the state at the time the plaintiff's contract was made, imposed no such conditions upon him as to the enforcement of the defendant's legal obligation to perform that contract, as the law of 1868 creates and imposes on him. The contract must be left with the same force and effect, including the substantial means of *enforcement*, which existed under the law of the state at the

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time the contract was made. I am, therefore, of the opinion that the judgment of the court below in this case should be reversed.

EMILY R. BAKER, plaintiff in error, vs. LYDIA A. LYMAN, executrix, defendant in error.

1. Though a levy on several city lots, all of which are claimed, recites that one of the lots, without designating which, was in the possession of the defendant in execution, the *onus* is not thereby cast on the claimant, and it was not error in the court to hold that the burden of proof was on the plaintiff in execution, and that he was entitled to open and conclude before the jury.
2. Letters from the claimant to the plaintiff or the record of a suit and judgment in favor of claimant against the defendant, which tend to illustrate the issues involved, and do in fact aid in determining it, are competent evidence for the plaintiff.
3. When the interrogatories of a witness have been taken on the ground of his being aged and infirm, and he resides in the town where the case is tried, this court will be slow to hold that the judge who tried the case, committed error in requiring the presence of, and sending for such witness, instead of permitting his interrogatories to be read; and particularly will this be so, when the court inquires to its satisfaction as to the ability of the witness to come into court and undergo the examination, and it further appears that the witness is a near relative to and the vendor of claimant, and that no injury resulted to claimant from such ruling by the court.
4. When all the property of a debtor in this state, except a very small portion, is transferred by a voluntary conveyance to a relative, it is not a sufficient reply to the issue of fraud made by a creditor upon such a deed, that the debtor has sufficient property in a distant state to discharge his indebtedness—especially if the donee was aware, at the time of receiving such deed, of the debt due the attacking creditor and that payment thereof was being urged.
5. It is proper for the court to qualify a request to charge as the testimony may authorize.
6. The question submitted by the court to the jury was the true one in the case, to-wit: was the deed made to hinder and delay creditors and was the claimant who took under it aware of that intention; and we cannot say that the verdict was not right under the evidence.

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Claim. Argument. Evidence. Interrogatories. Witness. Debtor and creditor. Fraudulent conveyance. Charge of court. New trial. Before Judge McCUTCHEN. Bartow Superior Court. September Adjourned Term, 1873.

At the September term, 1872, of Bartow superior court, Lydia A. Lyman, as executrix upon the estate of Samuel P. Lyman, deceased, recovered a judgment against Caleb Tompkins for \$1,300 00 principal, and \$515 80 interest, on a note dated December 27th, 1866, due one year after the date thereof, and payable to the order of plaintiff's testator. The execution based upon this judgment was levied as follows:

"Levied the within *fi. fa.* on two houses and lots on Stonewall street, in the city of Cartersville, Georgia, one of same occupied by defendant, said lots containing two acres each, more or less; also, one vacant lot on said Stonewall street, opposite the above described premises, containing one acre, more or less; also, one vacant lot lying south of A. F. Morrison's lot, and fronting on Main street, in Cartersville, Georgia, containing one acre, more or less, all levied on as the property of Caleb Tompkins, defendant in execution, this 8th day of October, 1872."

This property was claimed by Emily R. Baker. Upon the trial of the issue thus formed, substantially the following evidence was introduced:

The plaintiff introduced the record of the suit in which the judgment was obtained, the execution with the levy thereon, and proved by John H. Wikle that the defendant had been in possession of the property levied on for about seventeen years; that since the execution of the deed from defendant to claimant, both seemed to occupy the property; that witness did not know who had been in actual possession since the date of the deed, but thinks defendant; that after the defendant had been in possession of the property a few years, claimant came to live with him.

The claimant introduced testimony as follows:

1st. Deed executed by defendant on September 1st, 1869, in

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consideration of natural love and affection, conveying to "his niece," the claimant, various pieces of property, embracing that in dispute, witnessed by W. C. Green and N. D. Lewis. Recorded December 3d, 1870.

2d. N. D. Lewis, who testified as to the execution of the aforesaid instrument at the time it purports to bear date.

3d. The claimant, who testified that said deed was executed when it purports to bear date; that her uncle, the defendant, owned at the time of the execution of the said instrument, and still owns, two thousand eight hundred and eighty acres of land in northern Texas, also seven hundred acres or more, of mining and farming lands in middle Alabama; that she supposes "both are worth upwards of \$30,000 00;" that he was fully responsible for all the debts he owed, as they were but few, wholly independent of the property conveyed in said deed; that she does not know the plaintiff who purports to have been the wife of her testator; that testator told witness during his life that he was a widower with one son. That the deed was not made for fraudulent purposes. That the letters from witness to plaintiff's testator, (hereafter referred to), in speaking of the note given by defendant to said testator for means to carry on the mining matter here in the south, were not written to defraud him, as he was as deeply interested in that matter as was the defendant. That neither witness nor her uncle seek to swindle any one, but are pursuing their own lawful business, "which is their inalienable right, that every freeman has the right to enjoy without hindrance or molestation." That plaintiff's testator himself proposed to witness by letter to have the property deeded to her by defendant.

4th. At this stage of the case the claimant offered the depositions of the defendant, as of an aged and infirm witness. This evidence was objected to on the ground that the defendant resided in the city of Cartersville, within a few hundred yards of the court-house, had been subpoenaed and was able to attend court. Evidence was introduced *pro* and *con* as to his physical condition. The court sent a bailiff to notify him

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to come in person. This officer reported that he met the defendant coming out of his residence with a letter in his hand; that he notified him that the judge had sent for him to come into court, to which he replied that he was not able to go. That he saw nothing the matter with him. The court then ordered him brought in, and certifies that upon an inspection and personal examination of him, it became satisfied "that he was abundantly able to attend the court and to give his testimony discreetly and quietly." The court then excluded his depositions and claimant excepted.

5th. Caleb Tompkins, the defendant, who testified that he was nearly seventy-four years old, and his health not good; that he has an affection of the heart and is troubled with shortness of breath; that exercise or excitement impairs his memory. That the deed made by him to claimant was executed and witnessed the day it bears date. That he was then, and is still, solvent. That he did not own any other property in Georgia of any consequence at the time of the execution of said instrument, except that embraced therein. That the lot of land in Cherokee county, not covered thereby, is not worth more than \$100 00. That plaintiff's testator knew that he owned this property, and was worth \$20,000 00 or more. That he knew that this transfer of property to claimant was in contemplation and approved it. That he owned property in other states of the value of \$20,000 00.

Plaintiff, in rebuttal, submitted testimony as follows:

1st. Four letters from claimant to plaintiff's testator, all of which were objected to by claimant and objection overruled. The first dated November 29th, 1866. This communication commences by complaining that said testator, in a letter to defendant, had sent no message to the writer, and asserting that she was jealous and disposed to quarrel with him. Refers to their becoming acquainted in Washington city with pleasure. Argues the necessity of the union people of the north assisting those of similar sentiments at the south by loans of money on good security, by purchase of lands for future speculation, by developing the mineral interests, by

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sending German emigrants, etc. Refers to the large amount of property owned by defendant at the south, which he is unable to use in any way, as the rebels will not assist an union man, and as General Sherman ordered all the towns burned between Chattanooga and Atlanta, Cartersville included. Asserts that for this reason the defendant has been unable to do anything since his return, being unable to borrow even the small sum of \$300 00 at the north, for a few months, until he could build his house. That he has the lumber ready seasoned, but needs just that much to erect it. That when built he will be more than able to pay the person loaning to him, and it will at the same time give him a chance of transacting business for himself. Then proceeds as follows: "So if you have a friend, a married man, that can loan uncle the above named amount, or if even yourself, general, can accommodate him, do so, for I will assure you, on the honor of a lady, that he is very abundantly able to give you all the security you wish, as he has a great deal of real estate here at the south, and valuable mineral lands, that as you said in your letter, are of great value to him, or, if he should not live, to me, as his only heir, lands that he does not wish to sacrifice now for a song, when, by this little loan, he can do well enough without selling it, until such time as he can develop his mineral lands, and put them on market at his own price, or better, far better perhaps, as you named, to northern capitalists. And if you do not wish to loan it to *him*, loan it to *me*, general, 'tis in safe hands and a good investment"

The second dated December 14th, 1867. This letter acknowledges the receipt of favors of the 9th and 11th, instant, states that the defendant has given to the writer "such an old piece of news" to him (plaintiff's testator) his iron mine fifteen miles from Cartersville; that no deed has been made but that defendant will convey it through claimant to any purchaser. Asks testator to sell it for her for \$20,000 00 at once. Shows how it is worth that much and proposes various modes of sale. Offers to let him have \$4,000 00 out of the proceeds to pay her present indebtedness to him and the

surplus, as a loan. Begs that as he had been unable to raise the \$300 00 asked by her, that he will certainly send her \$100 "right off." Urges this last proposition with great earnestness and ability.

The third dated June 4th, 1868. The writer complains of having been misunderstood as to her or defendant's owing anything on the latter's property. Says she meant to state simply that they had some little bills contracted in order to live. Complains of inability to sell property or to collect debts; that there are no laws to do a loyal man justice; that "so soon as these lawful laws get established by our republican governor, R. B. Bullock, and he convenes a lawful and loyal radical legislature, we shall then get justice done us, and we will again have a chance to get what belongs to us." The writer then says that she can see no necessity of mortgaging their property to testator. Asserts in the most solemn manner the certainty that he will receive what is due him; that in any contingency, she and her uncle will have honor enough out of the large amount of property he has, to place enough of it in the hands of some lawyer or friend to secure him. Refers to the watchful care of providence over her and her uncle; urges the testator not to be unmindful of the manifold blessings heaped upon him, etc. The letter then proceeds thus: "I think if you were here, or anywhere in the fix that we are, I would not have so far forgotten your distresses, never, for when I am a friend, I am a friend. Oh! how my heart would have ached for you, and I could not have rested day or night, until your wants had been supplied, nor would uncle have rested until we had aided you. This is a woman's heart; I do not know a gentleman's, you see, so you will pardon me for expressing so much sincerity, but then I cannot help it. I have ever thought too much of you since we first met in the capitol at Washington, to feel otherwise, yet rather than see you suffer one hour, I would sacrifice much. Yet as you cannot let us have the \$300 00 without mortgages to you, rather than have our, at present, entirely unincumbered property hampered down so that it could not be sold at any hour be-

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tween this and fall, so that we can be at liberty to pay you out of those proceeds at any time, as soon as available, and give all that trouble and ourselves too, 'tis better as it is, for we do not wish to owe you either principal or interest no longer than to get it paid up, and a mortgage on it and their terrible no laws at all at this time, would neither prosper yourself nor us. We are too honorable to give such a mortgage. I feel it would be a disgrace to me in my own estimation, and I know uncle would be the same. You did not send the money here for such a purpose, but to speculate in gold lots. Uncle purchased the two lots; we have ever considered it as much your as our interest. You requested the note and uncle gave it to you, so that if anything should occur in the unsettled condition of the country, you could lose nothing, no way; and again, if all eventually became settled here you would have the benefit of the proceeds of the lots, did they prove available, so that we have ever supposed matters between us were thoroughly understood, and rested until that time contented. Yet as the south is—— we concluded it was much better to leave and go west, and do much better than east, as we thought of last summer, and I wrote you, and this is what we wish to sell out for, is to pay you, to settle up these little debts here, and while uncle goes west, for me to spend a few months north. But as you are unwilling to make a further loan of \$300 00 except by mortgage, we would rather do without the loan and make sale of the property as soon as possible, and pay you what we now owe you, for 'tis impossible to so entangle the property. We could never sell it at all then; it would be useless to try. I am sorry you have refused under that consideration. But with faith in God we will yet be blessed, we will try and make some other arrangement. Sincerely hoping that this will prove satisfactory, with regards," etc.

The fourth, dated June 25th, 1858. The writer begs to be excused for her long delay in replying as she and her uncle were considering what was best to be done; states that they had finally determined, for the sake of plaintiff's testator, to

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remain at Cartersville and to sell and pay out of debt; that they will not leave until every farthing due him is paid; that his recent desire to have her uncle mortgage to him \$20,000 worth of property to secure \$1,400 00, has made her sick of all debt.

2d. Two letters from claimant to plaintiff, also objected to, and objection overruled. The first dated October 19th, 1869, acknowledging receipt of favor of 10th instant, informing claimant of the death of testator. This document was full of grief and of the profoundest sympathy for the plaintiff on account of her irreparable loss in the death of her husband; informs plaintiff of the circumstances under which the indebtedness to her testator was created; states that \$1,000 00 of the amount embraced in the note held by the plaintiff was invested with her uncle in purchasing gold mining lots, the testator requesting the note only from her uncle to secure him against loss should any difficulty arise from the unsettled condition of the south, on account "of its continued rebelliousness;" urges that the mining property will prove a fortune to plaintiff, etc.

The second dated June 3d, 1870, acknowledging receipt of letter to her uncle, which she replied to on account of his serious illness; states that legal proceedings are entirely uncalled for; that the indebtedness will be paid at the earliest possible moment; that it would have been settled before had it not been for the severe sickness of her uncle; refers to the fact that martial law only existed then Georgia, to the confidence shown by her deceased husband in the writer and her uncle, and begs that she will extend the same, etc.

3d. W. C. Green, who testified that he was an attesting witness to the deed from defendant to claimant, and that it was not executed on the day it bears date; gives reasons for this statement.

4th. Record of suit in Bartow superior court in favor of claimant against defendant on note for \$15,000 00, dated December 10th, 1865, due January 1st, 1866, payable to claim-

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ant or order, with credit thereon of \$100 00, of date February 2d, 1869. Judgment rendered March 15th, 1873.

Then follows in the brief of evidence two letters from plaintiff's testator to claimant; by whom introduced does not appear, but it is supposed by the claimant, on account of their bearing on the case. The first was written from New York, dated December 11th, 1867, as follows: "I have just received your letter of the 7th instant, in which you say you are to do or cause to be done what I have urged you to do in a letter written three or four days ago on my return from the country. If you have any other property that will sell, use it now while you want money and must have it. One dollar now may be worth ten by-and-by. I shall rejoice in being able to do anything to help you accomplish your wishes and objects with the party or parties of whom you speak. If you should get here so that we could put our two heads together we could contrive some good way to crush anybody whom you did not like and desired to be crushed, and to put up anybody whom you liked and desired to be put up. For a month or more money will be scarce, but knowing men think and say that after that time there will be a change for the better. In the meantime we must get ready for selling or borrowing, or for whatever is the best that can be done. Nothing ventured nothing gained. Nobody yet comes to my relief. God bless you."

The second, from the same place, dated December 19th, 1867, acknowledges receipt of letter from claimant of the 14th instant, in reference to sale of mining interest given to her by her uncle, the defendant, advises her as to the best manner of effecting such sale, complains of the scarcity of money at the north, promises to assist her in carrying out her desires," etc.

The evidence being closed, the court held that the plaintiff in execution was entitled to the opening and conclusion of the argument, to which ruling the claimant excepted.

The court charged the jury as follows: "If the defendant *in f. fa.* was in possession of the property at the time the levy was made, this would cast the *onus* on the claimant.

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But if the defendant was not in possession at that time, then the burden would be on the plaintiff to show title to the property levied on in the defendant in *fi. fa.* Possession by itself, unexplained, is evidence of title for the consideration of the jury. If the defendant and claimant lived together on the land, or on any part of it, this would not be conclusive of a joint possession of the land so occupied. If two persons are living together on land, and the evidence shows that one owns and claims title to the land, and the other does not, then the possession would be in the one who owns and claims title, and not in the one who does not. A judgment lien, as such, binds only the property which the defendant in *fi. fa.* owned at the time the judgment was rendered, or owned at some time subsequent thereto, and it does not attach, as a judgment lien, to property which had been, *bona fide*, transferred by defendant before the date of the judgment. If the defendant in *fi. fa.* once owned the lands, and if the claimant claims title from the defendant in *fi. fa.* by virtue of a conveyance made before the plaintiff's judgment was rendered, then the property would not be subject to plaintiff's *fi. fa.*, unless the claimant's deed was, for some reason, void as against the plaintiff.

"If the deed from the defendant to the claimant was not made in good faith, but was made and intended by the parties thereto for the purpose of defeating, delaying or hindering the plaintiff in the collection of his debt, or other creditors of the defendant generally, in the collection of their debts, then the deed would be void, and no protection to the claimant in this case. A voluntary conveyance, without any consideration to support it other than love and affection, cannot be sustained against creditors whose debts existed at the time of the conveyance, unless the maker of such deed, at the time it was made, had other property or means besides the property so conveyed reasonably sufficient to pay his then existing debts. But, on the other hand, a voluntary conveyance made in good faith and without any intent to defraud or delay creditors, may be sustained against a prior creditor, provided the

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donor had, at the time of the conveyance, other property reasonably sufficient to pay his then existing debts.

"But it is insisted by claimant that General Lyman, plaintiff's testator, advised or consented to this conveyance to claimant, and is bound by that consent. On this point the court instructs you that a man may waive his rights and cannot complain of that which he advises, or to which he consents, with a knowledge of the facts. If General Lyman advised or consented to this conveyance, this is a fact for your consideration in determining whether the plaintiff should be allowed to attack the claimant's deed. If such advice or consent was given, claimant's deed would be valid as against the plaintiff, unless there were some false or fraudulent representations or concealment by defendant or claimant which misled General Lyman, and induced him so to advise or consent, you must find from the evidence how this was."

The jury found the property subject. The claimant moved for a new trial upon the following grounds, to-wit :

1st. Because the court erred in ruling that the plaintiff in execution was entitled to the opening and conclusion of the argument.

2d. Because the court refused to give certain requests in charge to the jury. These requests are numerous and are omitted as they were substantially given, though not in the precise language presented.

3d. Because the court erred in admitting the letters from claimant to plaintiff's testator, above set forth.

4th. Because the court erred in admitting the record of the suit in favor of claimant against defendant in Bartow superior court.

5th. Because the court erred in excluding the depositions of defendant and in having him brought into court to testify in person, under the circumstances above set forth.

6th. Because the court erred in charging the jury as follows: "If you believe from the evidence that the defendant in execution did have property other than that deeded to the claimant sufficient to pay his debts, still, if you believe from

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the evidence that the defendant intended by the transfer to hinder or delay creditors in the collection of their debts, then it was a fraudulent transfer and void."

"To this ground the presiding judge attaches a note to the effect that the language therein set forth must be taken in connection with his general charge to be properly understood.

7th. Because the verdict was contrary to the law and the evidence.

The motion was overruled and the claimant excepted.

M. R. STANSELL ; J. L. MOORE, for plaintiff in error.

JOHN W. WOFFORD ; JOHN W. WIKLE, for defendant.

TRIPPE, Judge.

1. The levy of the sheriff stated that one of the lots levied on was in the possession of the defendant in execution. It did not specify which lot. Had the levy stated which one of the lots was in his possession, and if that fact thus appearing would have been sufficient to shift the *onus* as to that lot, still there were several other lots which would not have been affected by such entry, and the rule in reference to the burden of proof as to those lots would have been the same as if there had been no such recital of the possession of one of them.

2. The great issue in the case was, that the conveyance made by defendant in execution to the claimant, was fraudulent as to the plaintiff. The letters of the claimant to the plaintiff were competent upon that issue, and the statements in those letters as to the condition or indebtedness of the defendant, made it competent also for the plaintiff to use the record of the suit and judgment by the claimant against the defendant. The date of the note to claimant, of the deed executed by the defendant to claimant, and of the suit by claimant on her note, were all points in the case which when considered together, tended to illustrate the question before the jury.

3. We cannot see how the claimant could have been injured

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by the court's sending for and requiring the presence of her uncle in court. He was claimant's witness. The judge inquired into the matter until he was satisfied that the witness was able to come into court. It does not appear that the witness was, from mental or physical weakness, affected by this requisition of the court so as to impair his mental capacity or memory, or that any damage resulted to claimant on account of it.

4. The claimant, when she took the deed on which she relies, knew of the debt due the plaintiff, and that its payment was being urged. The attack upon that deed is, that it was made with the intention to delay or defraud creditors, and the jury so found. It is not a sufficient reply to say that the debtor had sufficient property in another and distant state to discharge his indebtedness. If a debtor in this state can make a voluntary conveyance of all his property situate here, and then the reply to a complaining creditor that the debtor has property in Texas or Kansas, be sufficient to relieve the transaction of the charge of fraud, all the statutory provisions upon the subject of fraudulent assignments, would, in many cases, be of little avail to the creditor. The question is: was this deed made and received with a fraudulent intent?

5. It was objected that the court erred in qualifying a request made by plaintiff's counsel to give a certain charge to the jury. In looking through the testimony, we think the court had a right to add the qualification it did, and it was its duty so to do.

6. The charge of the court stated the true question to be decided by the jury, to-wit: was the deed made to hinder and delay creditors, and was that intention known to the claimant. The jury have passed upon the facts, the judge who tried the case refused to interfere with their finding, and we cannot say he abused his discretion.

Judgment affirmed.

Hambrick vs. Crawford.

THOMAS HAMBRICK, administrator, plaintiff in error, vs.
THOMAS S. CRAWFORD, defendant in error.

This case is controlled by the decision in the case of *Sarah Kelly vs. H. H. Brooks et al.*, 50 *Georgia Reports*, 582, and there was error in the refusal of the court to grant the revoking order which was asked for. McCAY, Judge, dissented.

Judgments. Statute of limitations. Before Judge HOPKINS. Clayton Superior Court. March Term, 1874.

This case was submitted to the presiding judge without the intervention of a jury, upon the following facts:

At the May term, 1864, of Clayton Superior court Thomas Hambrick, as administrator upon the estate of Sarah Jones, deceased, recovered a judgment against James F. Johnson, J. H. Johnson and Thomas S. Crawford, for \$1,675 00 principal, and \$786 00 interest. At the March term, 1869, the defendants moved to vacate said judgment on the ground that the consideration thereof was negro slaves. At the following September term this motion was sustained by Judge POPE, then presiding. About September 1st, 1873, the execution based upon said judgment was levied upon the property of Crawford, who, upon November 1st of that year, filed his affidavit of illegality, setting up the aforesaid vacating order.

It was also agreed that the question thus presented might be decided as though a motion to vacate said order was now pending and ready for a hearing.

The court sustained the illegality, and plaintiff excepted.

PEEPLES & HOWELL, for plaintiff in error.

SPEER & STEWART, for defendant.

TRIPPE, Judge.

The decision in *Kelly vs. Brooks et al.*, 50 *Georgia*, 582, controls this case. The judgment which has been vacated by an order of the court on the ground that the consideration of

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the debt was a slave, was not dormant when this motion to rescind that order was made, and should have been granted: See *Tyson vs. McAfee*, 50 *Georgia*, 279, and *Prescott vs. Bennett et al.*, *Ibid.*, 266, and *Mosely vs. Mitchell*, decided at the present term.

Judgment reversed.

TOLIVER B. GOOLSBY, plaintiff in error, vs. WILLIAM W. BUSH, defendant in error.

1. Under section 1951, Code, a promise to pay the debt of a third person is binding when there has been a full performance by the creditor of the conditions of the promise, and which was accepted by the promisor in accordance with the contract.
2. An offense against the person or property of a citizen, and punishable by fine and imprisonment or a more severe penalty, may be settled by the prosecutor and offender when there is no indictment or special presentment. The act of 28th October, 1870, found in section 4706, Code, only affects the right to settle such cases as provided by section 4606, Irwin's Revised Code, after action has been taken by the grand jury.

Statute of frauds. Criminal law. Settlement. Before Judge POTTLE. Oglethorpe Superior Court. April Term, 1874.

Bush sued Goolsby, in the justice court of the two hundred and thirty-sixth district, on the following account:

1872. "*Toliver B. Goolsby*,

" *To William W. Bush, Dr.*

"To 41½ bushels corn at \$1 31 per bushel.....\$54 00

"To balance due on horse..... 28 00

\$82 00"

The defendant pleaded the general issue, want of consideration, the statute of frauds, and that if he promised to pay the account sued on it was in consideration of the suppression of a prosecution against one George Martin for a misdemeanor.

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The justice rendered judgment for the plaintiff, and the defendant appealed to the superior court. Upon the trial in the last mentioned tribunal, the evidence made the following case:

The plaintiff had one George Martin in his employ as a laborer during the year 1871. Martin then became indebted to him the amount of the above account, and agreed that his minor son, Booker, should work for him during the year 1872, for the purpose of paying off the same. Booker accordingly commenced work, but after remaining a few weeks ran off, having been enticed away, as plaintiff believed, by his father, who then resided in Athens. Plaintiff sued out a warrant against George Martin for enticing away his servant during his term of employment. George was accordingly arrested and brought back to Lexington, in Oglethorpe county, accompanied by his son, Booker. At this place plaintiff met the defendant, and entered into a parol contract in reference to said laborers, to the effect that the defendant would employ them on his farm for the year 1872, at a price to be thereafter fixed, and pay to the plaintiff the account which he held against George Martin. The plaintiff, in consideration of the aforesaid, consented to this arrangement, and agreed not to prosecute George any further. He was bound over to appear at the next superior court, to answer for the misdemeanor with which he was charged, the defendant becoming his security. The prosecution was not thereafter pressed. George and Booker worked for the defendant during the year 1872, but he has not paid the account.

The defendant testified that he only agreed that if the laborers were not prosecuted further and were turned over to him for the year 1872, he would pay to the plaintiff what George made after reimbursing himself for whatever it became necessary to furnish him; that before the close of the year defendant notified the plaintiff that the crop of George was gathered and to come and get his pay. That after holding the corn and the money from the cotton, amounting to \$40 00, for some time, plaintiff failing to come, on the demand of George, he was compelled to turn the same over to

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him. That he never knew the amount of the account which the plaintiff claimed to be due.

The court charged the jury, among other things, as follows: "If defendant promised to pay plaintiff the sum of \$82 00, in consideration that the plaintiff would give up the negroes, or his claim on them for their labor in 1872, and if the understanding was that the debt of George Martin was to be canceled or extinguished upon the negroes going to defendant's, and the promise made by the defendant to the plaintiff to pay him the sum due by the negroes, then I charge you that it was the debt of the defendant Goolsby, and not within the statute of frauds."

"I also charge you that if the plaintiff consented for the negroes to quit his employment and go to the defendant, and the defendant assumed the payment of the debt, the negro, Martin, consenting to the arrangement, that was in law an extinguishment of plaintiff's debt upon George Martin, and he could not afterwards collect it out of Martin."

To each of which charges the defendant excepted.

The jury found for the plaintiff. The defendant moved for a new trial because the verdict was contrary to law and evidence, and because of error in the aforesaid charges. The motion was overruled and defendant excepted.

J. D. MATHEWS ; E. C. SHACKELFORD, by Z. D. HARRISON, for plaintiff in error.

W. G. JOHNSON, for defendant.

TRIPPE, Judge.

1. Plaintiff below gave up to the defendant his claim to the servant Booker, under the contract that defendant would pay him the debt due from Martin, the father of Booker. That portion of the contract was executed. Plaintiff lost Brooker's services toward paying the debt due from Martin, and the defendant got them and also the services of Martin himself

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under a promise to pay plaintiff's debt. Section 1951 of the Code excepts from the operation of the statute of frauds all cases where there has been performance on one side accepted by the other in accordance with the contract. This case comes within that rule.

2. It was objected that the contract was illegal, because it involved the settlement or compromise of an offense against the penal Code. Section 4609 of Irwin's Revised Code, provides that all offenses not punishable by fine and imprisonment or a more severe penalty, may be settled, etc. The penalty provided for the offense alleged to have been settled, is not fine and imprisonment, nor can it be both: Code, section 4500. Under these sections, it was not illegal to settle it. The act of 1870, Code, section 4706, applies to cases where there has been an indictment found or special presentment made. If either of these exists, then it is that there can be no settlement, unless by the approval and order of the court on examination into the merits of the case. Here there was neither an indictment nor presentment. It may be added that the act making it an offense to entice the servant from his employer, and prescribing the punishment therefor, is unaffected by any act making misdemeanors punishable as provided in section 4310 of the Code. The act of 1866 was subsequent to a somewhat general act on the subject of penalties for misdemeanors and is not controlled by it.

Judgment affirmed.

HARVEY MOSELY, plaintiff in error, *vs.* ROBERT G. MITCHELL, trustee, *et al.*, defendants in error.

This case comes within the principle of the decision in *Kelly vs. Brooks* *et al.*, 50 Georgia, 582, and as the motion to reinstate was not made until after the cause of action was barred by the statute of limitations, it was properly overruled.

WARNER, Chief Justice, dissented.

Judgments. Practice in the Superior Court. Statute of limitations. Before Judge JAMES JOHNSON. Muscogee Superior Court. October Term, 1873.

At the November term, 1873, of the superior court of Muscogee county, Harvey Mosely petitioned, in brief, as follows:

On April 2d, 1861, he loaned to Mrs. Ann Sealy and John Sealy \$2,187 50, taking their note therefor, payable on the first of the ensuing January. In order to secure the payment of said note, Robert G. Mitchell, as trustee for Mrs. Ann Sealy, and the said Ann Sealy, executed and delivered to him their mortgage on two lots in the city of Columbus. At the November term, 1867, he petitioned for the foreclosure of said mortgage, and a rule *nisi* issued and was duly served. This case remained upon the proper docket until the May term, 1871, of the court, when it was stricken on account of the failure of the plaintiff to file an affidavit of the payment of taxes as required by the relief act of October 13th, 1870, but no judgment of dismissal has ever been entered. No motion to reinstate said cause has been heretofore made on account of the decision of the supreme court of the state sustaining the constitutionality of such relief law. He therefore prays that said cause be now reinstated.

This petition was sustained by the affidavit of counsel. The only record evidence of the dismissal was the entry upon the bench docket as follows: "Dis. No affidavit filed. Thursday, June 22, 1871."

It was shown by parol that the dismissal was on motion of defendants.

The court refused to reinstate, and the plaintiff excepted.

PEABODY & BRANNON, for plaintiff in error.

THORNTON & GRIMES, for defendants.

TRIPPE, Judge.

It is sufficient to say that this case comes within the principle of the rule adopted in the case of *Kelly vs. Brooks*, 50

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Georgia, 582, and as the cause of action was barred by the statute of limitation when the motion was made to reinstate, there was no error in the judgment of the court in refusing the motion. For the reasons which control my opinion on this question, I refer to what I said in the cases of *Tison vs. McAfee*, 50 *Georgia*, 279, and *Prescott vs. Bennett et al.*, *Ibid.*, 266. As to the question, when was the mortgage in this case barred by the statute of limitations, see the case of *John George vs. James Gardner*, 49 *Georgia*, 441.

Judgment affirmed.

MCCAY, Judge, concurred.

On the ground that the judgment moved against being of such a character as the party might have corrected by bill of exceptions and he having failed to do so, he is barred after the lapse of thirty days from the adjournment of the court giving the judgment.

WARNER, Chief Justice, dissenting.

It appears from the record that the plaintiff's case was dismissed from the docket of the court in which the same was pending at the May term, 1871, because no affidavit of the payment of the taxes had been filed. At the November term, 1873, the plaintiff made a motion to reinstate the case on the docket, which motion was refused. As the court had no legal power or authority to dismiss the plaintiff's case out of court for that cause, the plaintiff should have been allowed to have reinstated the same on the docket where it rightfully belonged; but if the judgment of dismissal stood in his way, then the motion to set aside that judgment was made in time, as held by a majority of this court, in *Prescott vs. Bennett*, 50 *Georgia*, 266. The case that was dismissed for non-payment of taxes was a petition to foreclose a mortgage on real estate. When was the mortgage barred by the statute of limitations?

Daniels vs. Meinhard Brothers & Company *et al.*

THOMAS DANIELS, plaintiff in error, vs. MEINHARD BROTHERS & COMPANY *et al.*, defendants in error.

1. A garnishee, by his answer, discharges himself from any liability under the summons. There is no traverse of his answer, and subsequently money of the principal debtor, coming into his hands, another summons is served upon him. Under this last summons he returns the money into court:

Held, that no lien under the first garnishment attached to the money.

2. If intermediate the answer to the first summons and the service of the second, there was a *bona fide* transfer of the claim due the debtor (and which was collected by the garnishee) to another creditor, such last mentioned creditor has a good claim to the money.

3. The holder of a fire insurance policy, after a claim against the company has accrued under it, may *bona fide* assign in writing an interest in the same to a creditor to the extent of such creditor's debt.

4. Garnishment sued out against and served upon A and B, agents of an insurance company, does not bind a debt or liability due from the company to the principal debtor, unless the agents have the funds due such debtor, or its equivalent, in their hands at the time of their answer. If, after the money is sent to the agents by the company, a similar garnishment is served upon them, it is the latter service which fixes the lien of the garnisheeing creditor.

Garnishment. Principal and agent. Insurance. Debtor and creditor. Before Judge SCHLEY. Chatham Superior Court. May Term, 1874.

Meinhard Brothers & Company, Max Krauss & Company, Lillienthal & Kohn, and Symons & Company, defendants in error, were creditors of one Philip A. Zoller, who had sustained a loss by fire of certain goods which were covered by a policy of insurance issued to him by the Franklin Fire Insurance Company of Philadelphia, through their agents in Savannah, Purse & Thomas. On March 14th, 1872, Meinhard Brothers & Company, and Max Krauss & Company, commenced suit against Zoller, in the city court of Savannah, and, on the same day, had summons of garnishment served upon said Purse & Thomas as the agents of said insurance company, requiring them to appear at the May term, 1872, of the said city court, to answer what they were indebted to said

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Zoller ; at the said May term, they obtained judgment against said Zoller for the amounts of their claims, and subsequently, during said term, the said garnishees answered denying any indebtedness to said Zoller, and their answer was never traversed or in any way objected to. After the adjournment of said court, said creditors, on the 27th day of June, 1872, without giving any new bond or making any new affidavit, caused a second summons of garnishment to be served on said Purse & Thomas by which they were required to answer at the following July term of said court, what they were indebted to said Zoller, at the time of said summons, 27th of June, 1872, and between that date and the time of making return thereto. On the 17th day of August, 1872, said garnishees answered said summons, admitting at that time, 17th August, 1872, an indebtedness to said Zoller of \$800 00, which amount was received by them from the Franklin Fire Insurance Company of Philadelphia, as the loss by said Zoller covered by said policy of insurance.

Lilienthal & Kohn, defendants in error, obtained judgment against said Zoller at the same May term and on the same day as said Meinhard Brothers & Company, and Max Kraus^s & Company, and pursued the same course with like results as hereinbefore stated, *with this exception only*, that they did not commence suit until the 18th day of April, 1872, or sue out any summons of garnishment prior to that time.

The remaining defendants in error, Symons & Company, commenced suit against said Zoller, in a magistrate's court, on the 6th day of April, 1872, and obtained judgment on the 27th day of the same month, having, at the commencement of said suit, garnished said Purse & Thomas, and subsequently obtained judgment against them as garnishees, they having made a return on the 17th day of August, similar to that made in the cases before stated. At the November term, 1872, of the city court of Savannah, the judge of said court passed the following order:

"It appearing to the court that the sum of \$800 00 has been returned by Purse & Thomas, as agents of the Franklin

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Fire Insurance Company of Philadelphia, garnishees, as in their hands subject to the order of the court; and it further appearing that there are various parties besides those in this court, who claim certain interests in and liens upon said fund, which parties are represented by Thomas R. Mills, Jr., and R. R. Richards, attorneys of this court; and it being further represented that all parties in interest are anxious and willing that all claims, and liens, and priorities existing against, or arising out of, said sum of money, or which any one or all of said parties may have, should be determined by this court in as full a manner as if it were a court of equity, sitting for the purpose of distributing said sum of money according to the priorities established by law. It is ordered that said parties, so represented by said attorneys, Thomas R. Mills, Jr., and R. R. Richards, be, and they are hereby permitted to file in this court a statement of their respective cases, after which they shall have all such rights in this court as they might or could have had had they regularly claimed said money by a proceeding instituted for that purpose. The statements of said cases shall not, however, be conclusive upon those parties who have brought said sum of money into court, but they, or any of them, shall have the right to traverse the truth of the facts alleged therein. (Signed) W. S. CHISHOLM, Judge."

Whereupon said Symons & Company filed a statement of their case in substance as heretofore set forth, and plaintiff in error also filed the statement of his claim in substance as follows: That said Zoller, prior to sustaining said loss covered by said policy of insurance, was indebted to him in the sum of \$326 00, and upon applying for payment, after said loss was sustained, said Zoller offered to pay him out of the money which would accrue out of said policy, which was then in the hands of T. R. Mills, Jr., and S. W. Goode, attorneys at law, for collection, against said insurance company; that said Zoller, in consideration of his said indebtedness and a forbearance on plaintiff in error's part to sue him, delivered to him on the 27th day of March, 1872, the following order or draft:

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"Messrs Mills and Goode will please pay to Thomas Daniels the sum of three hundred and twenty-six (\$326 00) dollars out of the money due me on policy of insurance given by the Franklin Insurance Company of Philadelphia, through their agents, Purse & Thomas, at Savannah, Georgia.

(Signed)

P. A. ZOLLER.

"27th March, 1872."

"Accepted, and payable when we collect the money on said policy. (Signed)

"T. R. MILLS, Jr.,

"SAMUEL W. GOODE,

"per Goode."

"That on the 28th day of March, 1872, the following paper, as additional evidence of plaintiff in error's interest in said policy, was delivered to him by said Zoller:

"\$326 00. To T. R. Mills, Jr., and S. W. Goode. In consideration of a forbearance to sue, I hereby transfer and assign to Mr. Thomas Daniels an interest to the extent of \$326 00 in my policy in the Franklin Fire Insurance Company, said policy to be collected by my attorneys, and that amount to be paid to him out of proceeds.

(Signed)

"P. A. ZOLLER."

"Accepted, payable when collected.

(Signed)

"T. R. MILLS, Jr.,

"S. W. GOODE."

That in addition to the said orders or drafts, the following arrangement was agreed upon between said Zoller and his said attorneys, and plaintiff in error, on said 27th day of March, 1872, all being present; that on and after date plaintiff in error had an interest to the extent of \$326 00 in said policy of insurance, and said attorneys were to hold said policy and collect any amount due or to be due thereon, for plaintiff in error's benefit to the extent of his said interest, and for the purpose of *first* paying said accepted orders or drafts, and notice of plaintiff in error's said interest in said policy was, on the same day, given to said insurance company through their said agents, Purse & Thomas.

There being no question of fact in dispute the court ordered said fund to be distributed among the defendants in error, to the exclusion of plaintiff in error. The latter petitioned for the writ of *certiorari* which was ordered to issue. Afterwards, on the final hearing, the decision of the city court was affirmed except in one unimportant particular. To which ruling plaintiff in error excepted.

R. R. RICHARDS, by A. B. SMITH, for plaintiff in error.

JULIAN HARTRIDGE, by GEORGE A. MERCER, for defendants.

TRIPPE, Judge.

1. When the garnishees answered the first summons and there was no traverse of that answer, they were discharged from any liability under that proceeding. From the facts shown by the record, they could have made no other answer than the one they did. They had no money or effects of the principal debtor in their hands. Those proceedings being thus ended or determined, another garnishment was served upon them, and under this, money was returned into court. No lien under the first garnishment could attach to this fund because it was not a garnishment pending; it was *functus officio*, else there was no necessity for the second garnishment.

2. Intermediate the answer to the first and service of the second summons, the debt on which the money afterwards was paid to the garnishees, had been assigned to another creditor of the principal debtor. When the money was thus received by the garnishees, the claim on which it was collected did not belong to the debtor, nor was the money his, at least, so far as to the amount of the assignment. The claim that Zoller, (the debtor) held against the insurance company, was a *chose in action*, and section 2244 of the Code says: that all *choses in action* arising upon contract, may be assigned so as to vest the title in the assignee. The case of *Wallon vs. Bethune*, 37 Georgia, 319, goes far in sustaining the rights of creditors

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to claims which have been assigned by a debtor for the payment of creditors, and that, too, as against other creditors who attach and garnish for the purpose of reaching the claims so assigned: See Drake on Attach., section 709; 13 Mass., 304; 17 Johns, 284.

3. We see no reason why the holder of a fire insurance policy, after a claim against the company has accrued under it, may not *bona fide* assign in writing, an interest in it to a creditor, and to the extent of the debt due such creditor. Here the assignment was formal and in writing, with an order to the debtor's attorneys, in whose hands the claim on the insurance company was placed, and an acceptance of that order by the attorneys. It is similar in many of its features to the case in 37 Georgia, *supra*.

4. This court, in the case of *Selma Rome and Dalton Railroad Company vs. Tyson*, 48 Georgia, 351, held that a foreign corporation doing business in this state may be garnished for a debt it may owe in the state. But there, although the service of the summons was on the agent, it was directed to the corporation. Had it simply been a summons directed to the agent of the corporation, it would not have bound it. It could not have been treated as anything more than a process to the party to whom it was addressed and upon whom it was served. If Purse & Thomas had had in their hands at the time the first summons was served upon them, the money which was afterwards sent to them, then it could have been reached by it, and doubtless they would have made answer accordingly. But that garnishment sued out and served upon them, to-wit: Purse & Thomas, agents, etc., was not a process against the insurance company, and did not bind a debt or liability due from the company to the principal debtor. We think there was error in the judgment of the court postponing the claim of plaintiff in error to other creditors, and are of opinion that a *bona fide* transfer made by the debtor, P. A. Zoller, of an interest in his claim against the insurance company, gave the assignee a right to his portion of the fund superior to that of the creditors whose garnishments were

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sued out subsequent to the assignment, and which brought the money into court.

Judgment reversed.

JAMES L. PIERCE, plaintiff in error, vs. THE STATE OF
GEORGIA, defendant in error.

1. If a witness knowingly and willfully swears falsely in a material matter, his testimony should be rejected entirely, unless it be corroborated by the facts and circumstances of the case, or other credible evidence; and it is not a correct rule for the court to charge the jury, that credit may be given to such a witness, without also charging the necessity for such corroboration.
2. If a defendant on trial for using obscene language to a female, requests the court to charge, that the words must be offensive and an insult to the one to whom they are spoken to make them criminal, and the words are of themselves insulting and obscene, the burden is on him to show such provocation for speaking them, as would amount to a justification, before he is entitled to such charge.
3. Where it is competent to prove drunkenness; a witness may give the facts on which he bases his opinion and from those facts state what that opinion is.
4. Upon the question of the admissibility of such testimony in a criminal case, it is held by a majority of this court, that it is competent for the state to prove that a short time previous to the commission of the offense charged, the accused was intoxicated, provided such testimony makes it probable that the intoxication continued and existed at the time the alleged criminal act was done.

TRIPPE, Judge, dissents on the last point, as follows:

Whilst it may not be objectionable in a criminal case, for the witness for the state in giving the facts which constitute the offense charged, to state, as part of the *res gestæ*, that the defendant was intoxicated, it is not competent for the prosecutor to prove, as an independent fact in the case, that the accused was drunk a short while before the commission of the act charged, although it be so near to that time as to make it probable that the intoxication continued to the time when the offense was alleged to have been committed. Such evidence would neither excuse the crime, if offered by the accused, nor is it competent either to impeach the character or legally to show a greater probability of his guilt.

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Criminal law. Witness. Evidence. Charge of Court. Drunkenness. Before Judge McCUTCHEN. Bartow Superior Court. September Adjourned Term, 1873.

James L. Pierce was indicted for the offense of using obscene and vulgar language in the presence of Lucinthia E. Jones, a female, on March 31st, 1871. He pleaded not guilty. There was no question made by the evidence except as to the fact of the use of the language charged. The jury found the defendant guilty, but recommended him to the mercy of the court. The errors complained of will sufficiently appear from the motion for a new trial, together with the following synopsis of a portion of the testimony:

Mrs. Jones testified as to the use of the language charged, and that she asked the defendant at the time if he was drunk or crazy; to which he replied that he was neither, but was under the influence of morphine, and felt "mighty good;" that no one was present except the witness and the defendant.

It was disclosed that the defendant was the pastor of the Methodist church in Cartersville; that the same afternoon the offense is alleged to have been committed, he performed the funeral service at the burial of a Mrs. Espy, a member of his church; that shortly after (the evidence does not disclose the intervening time) the discharge of this pastoral duty, he went to the house of Mrs. Jones, when the obscene and vulgar language, according to the evidence for the state, was used. The prosecution proved, over the objection of the defendant, by James E. Roberts and Agnes Terrell, facts tending to show that he was under the influence of stimulants from the time of leaving the residence from which the corpse was taken, to his return from the grave-yard. These witnesses were allowed to give their opinions, based on the facts testified to by them, that the defendant was drunk. Evidence was also introduced tending to show that he was sober.

It is impossible to gather from the record the exact time which elapsed between the defendant's departure from the former residence of Mrs. Espy, and his arrival at the house

of Mrs. Jones. It appeared that the funeral service at the grave was unusually short.

A motion for a new trial was made upon the following grounds:

1st. Because the court allowed the witnesses, James E. Roberts and Agnes Terrell, to testify that the defendant was drunk on the day and immediately preceding the time of the alleged offense.

2d. Because the court allowed these witnesses to give their opinions that the defendant was drunk at the time aforesaid.

3d. Because the court refused to charge the jury as follows: "The speaking of the words charged in the indictment, to be a crime, must have been an insult to Mrs. Jones at the time they were uttered, and if the evidence showed that the words were spoken to her and in her presence, and were not offensive to her, they were not criminal and the defendant should be acquitted."

4th. Because the court charged the jury as follows: "If any witness has sworn willfully and knowingly false in any one particular, such witness is thereby discredited, and you may disregard the entire testimony given by that witness. But if you are satisfied that any portion of the testimony of such witness is reasonable or true, you are not bound to disbelieve such portion. You are not bound to disbelieve a truth because it may come from an unworthy witness. You have to find what is the truth in respect to every material matter."

The motion was overruled and the defendant excepted.

WARREN AKIN; ABDA JOHNSON; WILLIAM T. WOFFORD, for plaintiff in error, cited the following authorities.

1st. Evidence as to drunkenness inadmissible: Roscoe's Ev. 1st., 57; 1 Green. Ev., sections 51, 52.

2d. Opinions as to drunkenness inadmissible: Code, section 3867; 24 Ga. R., 518; 36 *Ibid.*, 64; 38 *Ibid.*, 409; 45 *Ibid.*, 443.

3d. Charge erroneous as to credibility of witness who had

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sworn falsely ; 1 Starkie's Ev., section 520 ; 7 Wheat., 283 ; 13 Ga. R., 512 ; 23 *Ibid.*, 297 ; *Ibid.*, 576.

4th. Request to charge should have been given : 41 Ga. R., 278 ; 14 Peter's R., 198 ; 24 Pick. R., 370.

A. T. HACKETT, solicitor general ; J. A. W. JOHNSON ; JOHN W. WOFFORD, for the state.

1st. Opinions of witnesses as to drunkenness, based on facts, admissible : Code, section 3867 ; 10 Ga. R., 511 ; 12 *Ibid.*, 257, 271 ; 31 *Ibid.*, 465 ; 38 *Ibid.*, 409 ; 6 *Ibid.*, 24 ; 20 *Ibid.*, 480, 600 ; 24 *Ibid.*, 518 ; 30 *Ibid.*, 116 ; 17 *Ibid.*, 484 ; 24 *Ibid.*, 26.

2d. Charge as to credibility of witness correct : 13 Ga. R., 508 ; 22 *Ibid.*, 478 ; 23 *Ibid.*, 216 ; 34 *Ibid.*, 339 ; 47 *Ibid.*, 71 ; Code, section 3875.

TRIPPE, Judge.

The grounds taken in the motion for a new trial are considered in the inverse order from what they appear in the motion.

1. In the case of *Morris Fishel vs. Lockard & Ireland*, 52 *Georgia Reports*, 632, the judge of the superior court, on the trial thereof, charged the jury, that "if a witness swears willfully and knowingly false, even to a collateral fact, his testimony ought to be rejected entirely, unless it be so corroborated by circumstances or other unimpeached evidence, as to be irresistible." Upon a review of that charge it was held to be error, and that although the charge was in the words of the head-note to the case of *Ivey vs. The State*, 23 *Georgia*, 236, upon an examination of the judgment of the court in that case, it did not sustain the rule to the full extent to which it went in the head-note. It was also said that it was much broader than the rule stated in *Day & Company vs. Crawford*, 13 *Georgia*, 508, which is, that "if a witness swear willfully false upon any one material point, the jury are at liberty to disregard his testimony altogether unless corroborated by circumstances, or other unimpeachable evidence."

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Reference was also made to the decision in *McLean vs. Clark*, 47 Georgia, 508, in which it is held that "the point upon which the untruth is stated must be material." We think the true rule to be deduced from these decisions, and one that is proper to be given in charge to the jury when the question arises, is, if a witness knowingly and willfully swears falsely in a material matter, his testimony should be rejected entirely unless corroborated by the facts and circumstances of the case, or other credible evidence. And we do not think that it is a correct charge for the court to say that credit may be given to such a witness, without also stating the necessity for such corroboration. The charge of the court in this case gave no such qualification, stated nothing as to corroborating circumstances or evidence, and in that, there was error.

2. The court was requested to charge that the words alleged to have been used by the defendant must have been offensive and an insult to the one to whom they were spoken, to make them criminal. The statute defining the offense with which defendant is charged, says, any person who shall, *without provocation*, use to or of another, and in his presence, opprobrious words, etc., or *who shall, in like manner, use obscene and vulgar language in the presence of a female*, shall be guilty, etc. If the provocation for the speaking of the words be given and proved, then the justification is made out, whether the words be offensive and an insult or not. If the words used be of themselves obscene and vulgar, the question of defense would be, after the state had proved there was no provocation, whether there was in fact any provocation for speaking them. The test of this could not be, simply whether they were offensive and an insult to the person to whom they were addressed. That fact might be a circumstance affecting the inquiry as to there having been a provocation, but not one to determine absolutely the defendant's guilt or innocence.

3. As to whether it is competent for a witness to give his opinion upon the question of the drunkenness of a person, it is like other matters of that sort, and if the facts upon which the opinion is based are stated, the witness may, from those

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facts, state what that opinion is. It was said in *Choice vs. The State*, 31 Georgia, 466, 467, that the testimony was wholly unexceptionable, where the witness stated, "prisoner, from his appearance, had been drinking." "Although witness did not see him drinking, yet he judged, from his manner and appearance, that he had been drinking; had seen him frequently in that condition before." Many citations could be given sustaining the admissibility of such opinions under the qualifications stated.

4. It was objected by counsel for defendant that it was not competent for the prosecution to introduce evidence against him showing that he was intoxicated. Upon this point it is held by a majority of this court, that it was competent for the state to prove that a short time previous to the commission of the offense charged, the accused was intoxicated, provided such testimony makes its probable that the intoxication continued, and existed at the time the alleged criminal act was done. This is the judgment of the court on this point, but I cannot concur in it. I understand it is put on the ground that it is but giving the surrounding circumstances at the time of the commission of the offense, as a part of the *res gestæ*. I will not deny that a witness for the state in giving the facts which constitute the offense charged—the transaction itself—may state as part of the *res gestæ*, that the defendant was intoxicated at the time. Indeed, it is difficult to conceive what could then happen which the witness, who gives an account of the occurrence, may not state. Certain it is, that many things are competent to be given in evidence, or I would rather say, may be detailed by the witness, as being a part of the *res gestæ*, which would be incompetent, from any other witness. What could be the object or effect of such testimony in this case? It will be admitted that it could not be introduced for the purpose of attacking the character of the defendant. He had not put his character in issue, and the state could not. Nor will it be claimed that its legal effect would be to show a greater probability of defendant's guilt. This being so, there could be nothing in the issue on trial which

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would be legally affected by such evidence. The chief witness for the state, who proved the *res gestæ*, did not say the defendant was intoxicated; and though the rule of evidence might have permitted her to state that fact, if true, yet, I cannot think the prosecution was entitled to prove as an independent fact in the case that the accused was intoxicated a short while before the commission of the act charged, although it be so near to that time as to make it probable that the intoxication continued to the time when the offense was alleged to have been committed. The danger of admitting such evidence is illustrated in this case. Some of the witnesses affirm that the defendant was drunk, others deny it. All the witnesses testifying on this point saw him at the same time. Here, then, was conflicting testimony on a matter which, in law, was immaterial upon the question of defendant's guilt, the issue to be tried, and yet the burden of meeting it was forced on the accused, and the mind of the jury unnecessarily distracted by it. No one could voluntarily submit to a charge of drunkenness, whose moral character might be ruined by it, and he ought not to be compelled to contest such a charge made by testimony, unless it has a legal significance and force on the issue under investigation. A new trial is granted on the first ground noticed in this opinion.

Judgment reversed.

ALBERT B. ROSS, administrator, *et al.*, plaintiffs in error, vs.
THE CENTRAL RAILROAD AND BANKING COMPANY, defendant in error.

1. If, in an action of ejectment, the defendant set up title by prescription, to-wit: seven years adverse possession under color of title, it is no reply to the defendant's case to show that the plaintiff has been "by fraud debarred or deterred from his action," unless it further appear that the defendant, or those whose adverse possession it is necessary he shall tack with his to make out his prescriptive title, have been guilty of or had knowledge of the fraud.

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2. The limitation act of 1856, prescribing that no limitation shall run against an unrepresented estate unless the lapse exceed five years, as well as section 2688 of the Code providing substantially the same thing as to prescription, apply to the causes of action existing in favor of estates unrepresented at the time of the passing of the act of 1856, so far as to require the said estates to be represented within five years from the passage of said act.

WARNER, Chief Justice, dissented.

Ejectment. Prescription. Statute of limitation. Administrators and executors. Before Judge HILL. Bibb Superior Court. October Adjourned Term, 1873.

Reported in the opinions.

J. & J. C. RUTHERFORD, for plaintiffs in error.

LYON & IRVIN, for defendant.

McCAY, Judge.

1. The principal question in this case is the true construction of section 2688 of the Code, in those words of it which provide, among other exceptions to the statute of limitations, "cases of fraud debarring or deterring the other party from his action until the fraud is discovered." It is contended that if the plaintiff was deprived of his rights by fraud, no matter by whom, that the statute never went against him, no matter who was in possession, until the fraud is discovered. That he, the plaintiff, stands as one under disability, as an infant, lunatic, and the statute does not run. On the other hand, it is contended, and so the court below decided, that the reply of fraud can only be made to the person guilty of the fraud, and that if the property has gone into the possession of one guiltless of any participation in the fraud, the statute runs in his favor from the date of his possession, no matter when the plaintiff may have discovered the original wrong. It is certainly a startling proposition insisted on by the plaintiff in error. It is simply this: that if one be deprived of his rights *by fraud*, that no length of time, no change of owner-

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ship, no *bona fides* of new parties can ever bar the person wronged, or his heirs, until the fraud be discovered. To put a case: Suppose one, one hundred years ago, had been deprived of his rights by the spoliation of a will. So long as the fraud remains undiscovered, no matter what new parties, new interests and new rights may arise, the statutory bar never arises until the statutory period after the discovery of the fraud. It seems to me that this view of this section is utterly inconsistent with sections 2679 and 2683. Those sections expressly require the person setting up the prescription to have been *tinctured with the fraud*, or to have had notice of it, *at the time of his going into possession*, before they deny to his possession the character of being adverse. The construction of section 2688, as contended for, would make it depend entirely upon the *discovery* of the plaintiff, no matter how honest and *bona fide* the defendant may be, no matter how long his possession. The position is, that the person defrauded, and his heirs, are under *disability*, that they are *out of the statute*, by its express words, and that no matter how long the defendant, though entirely innocent, may have been in the open, avowed and notorious possession, he is not protected. So startling a proposition, one that unsettles *every title* in the state, requires a close examination. In my judgment such is not the meaning of the law makers. To state the proposition in other words, it is this: If the original wrong be a fraud, no matter by whom, if the plaintiff can say that the fraud has only been discovered within seven years, he is entitled to recover, no matter how long and no matter how honest the claim and the possession of the defendant may be. This section of the Code first came into our law by the act of 1856: See acts of 1855 and 1866, pamphlet, page 236. In that act, as well as by the Code, the statute of limitations was made in terms to apply to courts of equity as at law, and it is just here, where, in my judgment, the error of those who give the statute the construction, that this provision puts the plaintiff upon the ground of being under *disability*, arises. The provision did not exist in the English statute of limitations, nor in our

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act of 1767, and the subsequent acts, until 1856. It was a rule adopted by courts of chancery in England to regulate and limit their power to interfere. They were not bound by the statute of limitations. They, however, refused redress when the plaintiff's demand was a stale one, and they laid down the broad rule that a demand never became stale against one guilty of a fraud until the fraud was discovered.

It was not upon the ground that the plaintiff was under disability : Lord REDESDALE, in *Hoveden vs. Lord Annesley*, 2 Sch. and Lef. R., 634, lays down the rule and the reason of it as follows: "That the statute ought not in conscience to run; the conscience of the party being so affected that he ought not to be allowed to avail himself of the lapse of time." Judge STORY in the case of *Pratt vs. Northam*, 5 Mason Rep., 110, enunciates a similar doctrine. That was a case where an administrator had got into his hands, assets, bonds, etc., belonging to the intestate in England, which were not known by the heirs to have belonged to him, and the heirs had only lately discovered the fact, the administrator having made no return of such bonds, and fraudulently concealed, not only that he had them, but that they, in fact, existed. The suit was against the administrators of the security on his bond, and Judge STORY says: "It is said here is a case of fraud, and fraud constitutes, in equity, a good exception to the statutes of limitation. But then the fraud must be the fraud of the party setting up the bar of the statute. If this statute is to be avoided by any fraud it must be the fraud of the parties themselves, and not of third persons with whom they have no connection or privity. There is no pretence in this case of any fraud on the part of the testator of these defendants, the security." As I have said, the rule does not turn on the *disability* of the plaintiff, but on the fraud of the defendant. He, the guilty party, shall not be allowed to say that his own concealment of the plaintiff's rights shall work in his favor. And the very words of this section of the Code indicate this idea. It is not put or classed with *disabilities*, but under the head of exceptions, and the language is not

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general in cases of fraud debarring the plaintiff, but debarring the *other party*, the party opposite to himself in the fraudulent transaction. For these reasons we think the charge of the judge was right. The defense of the plea of prescriptive right was good in the defendant and those under whom it claims without notice. The reply of fraud was only good in case the conscience of the defendant was affected by the fraud. It is not a case of disability in the plaintiff, but a case where the law says to the defendant, you shall not take advantage of your own fraud, unless the plaintiff has kept still seven years after its discovery.

2. We think, too, that the act of 1856, and the Code, setting the statute of limitations in operation against unrepresented estates on the lapse of five years, applied to cases then in existence. They come within the letter of the law, that is, if the statute be treated as beginning to run at the passage of the act, and there is no hardship or unfairness in so applying it. Such, too, has been the usual understanding of the act.

Judgment affirmed.

TRIPPE, Judge, concurred, but furnished no written opinion.

WARNER, Chief Justice, dissenting.

It appears from the record in this case that William Bond was the owner of a city lot in the city of Macon, and died in the possession thereof, leaving one child, Mrs. Kah, formerly Mrs. O'Connor, who had two children by O'Connor, her former husband, named William and Bridget. William died in 1860; Bridget intermarried with Dillard, and died in 1863. Bond, the father of Mrs. Kah, died in 1851. In September, 1852, Mrs. Kah conveyed the city lot in dispute, by deed, to Thompson. In 1859, Thompson conveyed the lot, by deed, to Blake. In 1869, Blake conveyed the lot, by deed, to Jones, and in December, 1869, Jones conveyed the lot, by deed, to the Central Railroad and Banking Company, the present defendant. Within a year or two after the death of Bond, Dillard, the husband of Bridget, who is now in life, took out

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letters of administration on the estate of Bond, and sued Thompson for the lot. Thompson filed a bill to enjoin that suit, which was perpetually enjoined by the decree of the court, on the ground, we suppose, (though it does not affirmatively appear,) that he had purchased the lot from Mrs. Kah, the heir-at-law of Bond, and there were no debts of the deceased to be paid. Thompson, and those claiming under him, have been in possession of the lot since his purchase from Mrs. Kah. In 1869 or 1870, it was discovered, for the first time, that Bond left a will, the contents of which were duly proved, as well as the destruction thereof by Mrs. Kah, and a copy of the same was duly established by the court of ordinary of Bibb county, admitted to record, and Ross was appointed administrator with the will annexed, on the estate of William Bond, deceased. By the will of Bond the lot in dispute was devised to Bridget, the wife of Dillard. This suit was brought in the name of the plaintiff on the demise of Ross, the administrator of Bond, with his will annexed, and on the demise of Dillard, who was the husband of Bridget, the devisee under the will, against the defendant to recover the possession of the lot in dispute. The defendant claims title by prescription under the 2683d section of the Code. The evidence in the record is clear that Bond died leaving a will, by which he devised the lot in controversy to his grand-daughter, Bridget, the wife of Dillard; that shortly after the death of Bond, his daughter and only child, Mrs. Kah, destroyed the will by burning it; that she concealed the fact of there being a will and its destruction, from the devisee and her husband, Dillard, and everybody else, so far as the record shows, except Thompson, to whom she communicated the facts when he purchased the lot from her. There is no evidence that Blake, Jones or the defendant, had any notice of the fraudulent destruction of the will and concealment thereof, at the time of their respective purchases of the lot. This suit was commenced within less than seven years from the discovery of the fraud, and the question is, whether the plaintiff is barred of his right to recover the possession of the lot as against the de-

fendant? The defendant insists that it has a good title by prescription, as against the plaintiff, because it, Jones and Blake, have been in the adverse possession of the lot for more than seven years under written evidence of title, without notice of any fraud brought home to either of them. This may be all very well, so far as they are concerned, if the prescriptive title under which they claim had been running in their favor as against the plaintiff in this suit. But was it running in their favor as against him? Mrs. Kah had no title to the lot when she conveyed it to Thompson. Thompson conveyed none to Blake, nor Blake to Jones, nor Jones to the defendant. The title to the lot was in the devisee under Bond's will, and if there had been no statute of limitations or prescription, no one would question the plaintiff's right to recover the possession of the lot from the defendant, on the strength of his own title. If the plaintiff is *excepted* from the operation of the statute of limitations, or prescription, until the discovery of the fraudulent concealment and destruction of the will, then neither the statute of limitations or prescription, run against him in favor of the defendant.

Was the plaintiff in this case excepted from the operation of the statute of limitations, or prescription, until the discovery of the fraud? The 2931st section of the Code declares that if the defendant, or those under whom he claims, has been guilty of a fraud by which the plaintiff has been debarred or deterred from his action, the period of limitation shall run only from the time of the discovery of the fraud. The 2688th section declares that a prescription does not run in cases of fraud debarring or deterring *the other party* from his action, until the fraud is discovered. This section relating to prescription, it will be observed, does not restrict the fraud by which the plaintiff has been debarred or deterred from his action, to the fraud of the defendant, or those under whom he claims, but declares in general terms that a prescription does not run in cases of fraud debarring or deterring the other party from his action. The defendant claims the benefit of the prescription as running in its favor. The plaintiff is *the*

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other party, who, by the fraudulent concealment and destruction of the testator's will was debarred and prevented from all knowledge of his rights under it, and consequently was debarred and prevented from bringing his action to recover the same. If the facts disclosed in this record do not make a case of fraud within the words and meaning of the statute, which necessarily debarred and deterred the plaintiff from bringing his action to recover the possession of the lot devised by the testator's will, it is extremely difficult to say what would constitute a case of fraud, which would prevent the running of the statute as against a plaintiff claiming the benefit of the exception made by it in his favor. As already remarked, the 2688th section, in relation to a prescription not running in cases of fraud, is not confined to the fraud of the defendant and those under whom he claims, as declared in the 2931st section, but if it did, the defendant in this case claims title to the lot under Mrs. Kah, who was the actual perpetrator of the fraud, and under Thompson who had knowledge of it at the time he purchased the lot from her. The defendant has no other paper title to the lot except that which it derived under and through Mrs. Kah, who concealed and destroyed the will of her father in order that she might inherit his property as his heir-at-law. The fact that administration was taken out on Bond's estate in ignorance of the fraudulent concealment and destruction of his will, and the decree obtained by Thompson, who had knowledge of the existence of the will at the time, has no legal significance or effect whatever as to the rights of the devisee of Bond, under his will, even if the grant of administration by the ordinary on Bond's estate was not *void*. The devisee of Bond, under his will, was not a party to that proceeding, and is not bound by it, and none of the parties pretend to have derived their title to the lot under any *judicial sale* or order of any court. The title of the defendant is derived from Mrs. Kah, and she had none to convey. If the plaintiff had been an infant at the time of the commencement of the defendant's prescriptive title, it would hardly be contended, we suppose, that the prescription would

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have run against him. Why not? Because he would have been *excepted* from the operation of the statute. Just so in this case, the prescription did not run in favor of the defendant as against the plaintiff, who is *the other party*, because of the fraud of Mrs. Kah in the destruction and concealment of the testator's will, which fraudulent act debarred and deterred him from his action until the fraud was discovered. The defendant cannot claim a prescriptive right to the lot except by the terms of the statute which confers that right. The question in this case, is not whether the defendant has had possession of the lot for seven years under written evidence of title and a *bona fide* claim of right, but *the* question is whether the defendant can claim a prescriptive title to the lot in dispute under the statute as against the plaintiff, who was debarred and deterred by fraud from instituting his action against the defendant to recover the possession of the lot until the fraud was discovered by him. The plaintiff being *excepted* from the operation of the statute under which the defendant claims its prescriptive title to the lot, therefore, no prescription ran in its favor as against the plaintiff until the discovery of the fraud by him. The defendant cannot claim the benefit of the statute of prescription for its protection, when that same statute expressly declares that it does not run in cases of fraud debarring or deterring the other party from his action until the fraud is discovered. The plaintiff in this case is the other party, and no prescription ran against him in favor of the defendant as to the possession of the premises in dispute until the discovery of the fraud. The defendant cannot claim a title by prescription under the statute, and at the same time *repudiate* that part of the same statute which declares in express terms, that prescription does not run in its favor, on the statement of facts disclosed by the record in this case. I am, therefore, of the opinion that the judgment of the court below should be reversed.

Glass et al. vs. Clark.

SAMUEL GLASS *et al.*, plaintiffs in error, *vs.* GEORGE E. CLARK, defendant in error.

A bill was filed against G. E. Clark and G. W. Morgan, as tenants in common, to enjoin the erection of a mill-dam and to abate the same, and the mill pond, as a nuisance. The injunction was refused by the chancellor, and the bill is still pending. In the meantime, another bill was filed against Clark, individually, charging that the dam had been washed away, that complainants had agreed for value with the counsel for Clark, and by Clark's authority, that a decree might be taken on the first bill, perpetually enjoining the defendants from erecting the dam; that Clark was disregarding the said agreement, and was repairing and erecting the dam, and that Morgan had no further interest in the mill, having sold to Clark. The last bill prayed for a specific performance of the contract with Clark, and in the meantime for an injunction against him. It appeared on the hearing of this second application for an injunction that Morgan's interest in the property had been assigned as a homestead for his wife and children:

Held, that the chancellor was not in error in refusing the injunction, as Morgan was not a party, the more especially as the testimony was conflicting as to Clark being the sole owner.

Injunction. Party. Specific performance. Before Judge CLARK. Sumter county. At Chambers. September 21st, 1874.

The facts of this case are sufficiently reported in the above head-note.

R. F. LYON; HAWKINS & HAWKINS; JACK BROWN, for plaintiffs in error.

N. A. SMITH; C. T. GOODE, for defendant.

TRIPPE, Judge.

The second bill was against Clark individually. The contract it seeks to enforce was made with Clark. That contract involved a disposition of the case made by the first bill to which Morgan was a party. Morgan had a right to be heard upon the question as to his interest. It furthermore appeared that Morgan's interest in the property had been assigned as a

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homestead for his wife and children. The testimony was also conflicting upon the point as to Clark being the sole owner. Surely, a specific performance of a contract with Clark, and a decree under that contract restraining Morgan from the use of property in which the original bill charged he had an interest, and to which bill he was a party, could not be granted, unless Morgan was a party to the proceedings in which such a decree was sought. Under this view, and more especially as there was contradictory testimony as to Clark's having the title to the whole property, and that, too, without a right on the part of Morgan to be heard, we cannot say there was error in the refusal of the injunction prayed for.

Judgment affirmed.

SILAS B. PALMOUR, for use, etc., plaintiff in error, vs.
JOHN PALMOUR, defendant in error.

1. To an action brought upon an indorsement of a judgment, which stipulated that the indorser was to be liable if the defendant in the judgment "proves insolvent," a plea denying the insolvency of such defendant is not a plea in abatement.
2. As the property assigned as a homestead to the defendant in the judgment had ever been, since the transfer, subject to the same, and is of greater value than the amount of the judgment, we do not think that the verdict was against the weight of evidence so as to make it an abuse of discretion in the judge who tried the case, to refuse to set it aside.

Indorsement. Judgment. New trial. Before Judge KNIGHT. Dawson Superior Court. April Term, 1864.

Silas B. Palmour, for the use of Reuben H. Moss, brought complaint against John Palmour upon the following indorsement :

"I hereby sell and transfer the within note, and the judgment and *f. fa.* predicated thereon, sued in Gilmer superior court, to be personally liable to S. B. Palmour if the defend-

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ants prove insolvent. I am also to pay the attorney's fees. This 12th day of October, 1862.

(Signed)

"JOHN PALMOUR."

The note referred to in the above transfer was dated February 1st, 1861, for \$1,050 00, payable to John Palmour or bearer, signed by S. M. Rolston & Company.

The declaration alleges that at the date of the aforesaid assignment there was \$1,300 00 due on the judgment therein referred to, and that the defendants therein were insolvent.

At the trial term the defendant, John Palmour, pleaded that the defendants in the judgment were not insolvent. This plea was submitted to the jury together with the pleas of the general issue and the statute of limitations.

The evidence disclosed that since the rendition of the judgment aforesaid, the wife of Samuel M. Rolston, a member of the firm of S. M. Rolston & Company, had had set apart to her a homestead, under the act of 1868, in the lands of her husband, which exceeded in value the amount due on said judgment.

The jury found for the defendant. The plaintiff moved for a new trial upon the following, among other grounds:

1st. Because the defendant, at the trial term of the court, in the midst of the argument of a motion for continuance, filed, among other pleas, the plea in abatement, which should have been submitted to the jury alone.

2d. Because the verdict was contrary to the law and the evidence.

The motion was overruled and plaintiff excepted.

WIER BOYD; M. S. SMITH; W. P. PRICE, for plaintiff in error.

JASPER N. DORSEY, for defendant.

TRIPPE, Judge.

1. Where the right of action is contingent upon the happening of some event or the occurrence of a certain fact, and

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suit is brought thereon alleging that the condition has been satisfied, a plea denying such allegation has no feature of a plea in abatement. It is a plea to the merits. Indeed, there was no necessity for the plea. The burden, by the very terms of the contract, was upon the plaintiff to prove as true precisely what the plea denied to be true. The general issue was all that was necessary, so far as the question raised by that plea was involved, and there was no error committed in this point to the injury of the plaintiff.

2. The contract contained in the transfer of the judgment, was made in 1862. The homestead assigned to the wife of Rolston was in value greater than the amount of that judgment. That homestead was subject to the judgment which was assigned to the plaintiff, the same having been rendered in 1861. The assignor was to be liable only in the event that the defendants in the judgment "proved insolvent." It was evident, from the testimony, that plaintiff could satisfy the judgment out of property which was liable to it. Consequently the verdict is not against the evidence.

Judgment affirmed.

W. E. PARAMORE, plaintiff in error, *vs.* THE WESTERN
RAILROAD COMPANY, defendant in error.

Where a railroad, which is the last of a connecting line, receives, for the purpose of completing the transportation, cars loaded with hogs, which were so crowded that some of them were suffocated when they reached the point of destination, such road becomes responsible to the owner of the hogs for their delivery, and the burden is on it to show whether the suffocation occurred before or after its reception of such cars.

Railroads. Before Judge JAMES JOHNSON. Muscogee Superior Court. November Term, 1873.

Suit was instituted by Paramore in the justice court of the seven hundred and seventy-third district against the Western

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Railroad Company for \$89 28, damages done to a lot of hogs in the transportation of the same to the city of Columbus. The case was carried by appeal to the superior court. The evidence presented the following facts :

The hogs were shipped from the town of Normandy, in the state of Tennessee, to the plaintiff, at the city of Columbus, in the state of Georgia. Fifty-two were placed in one car and fifty-one in another. They arrived at the city of Atlanta in good condition. They were then changed to the cars of the Atlanta and West Point Railroad Company, which were too small and close. They were conveyed in these cars without examination, to Columbus, where several were found to be dead. The witnesses believed that this resulted from their being too closely confined. There was no proof of any formal receipt for the hogs having been given by the defendant to the Atlanta and West Point Railroad Company. The evidence simply showed that a through bill of lading from Normandy, Tennessee, to Columbus, Georgia, was given ; that the cars upon which the hogs were placed at Atlanta went through to Columbus, being transferred from the Atlanta and West Point Railroad Company to the defendant at West Point. The value of the hogs was also proven.

The jury found for the defendant. The plaintiff moved for a new trial upon the following grounds, to-wit :

1st. Because the court erred in charging the jury as follows : "This defendant, if it be a road of a connecting line, is liable for the loss, if it has been shown that it was the last of the line, and gave a receipt for the hogs as in good order. It will also be liable if it be the last of a connecting line receiving them from the Atlanta and West Point Railroad Company in such a condition as to entitle the Atlanta and West Point Road to such a receipt from the defendant. The jury will determine whether such a receipt was given, or whether the Atlanta and West Point Road was in such a condition as to the hogs as to entitle the Atlanta and West Point Road to have such a receipt given ; if so, the defend-

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ant is liable for the loss. But if no such receipt was given, and if the Atlanta and West Point Road was not in a condition rightfully to demand such a receipt, you will then inquire and determine upon what road the loss occurred, and if it should appear from the testimony that the loss occurred from the neglect of the Atlanta and West Point Road, then such road is liable for the loss and not the defendant."

2d. Because the court erred in charging the jury as follows: "If the hogs were crowded together in improper cars by the Atlanta and West Point Road, and thereby the hogs were suffocated, then said suffocation is the act of said Atlanta and West Point Road, and such road is liable to the plaintiff for the loss and not the defendant, although the hogs died after they were received by the defendant, and while they were upon defendant's road."

3d. Because the verdict was contrary to the evidence.

The motion was overruled and the plaintiff excepted.

PEABODY & BRANNON, for plaintiff in error.

J. F. POU, for defendant.

TRIPPE, Judge.

There is no proof as to what time the hogs died from suffocation. It is stated by the witnesses that they were placed on the Atlanta and West Point Railroad in cars which were too small and close, and that they were received in the same cars by the defendant, and carried in them without examination to Columbus, where several were found to be dead, and it was thought that this resulted from their being too closely confined. Now, if the hogs had been suffocated whilst they were being transported by the Atlanta and West Point Railroad, then it would not only have appeared who committed the first default, but that whilst committing it the damage had resulted. And if this defendant had proved such to be the fact, then the liability might have been exclusively fixed on the West Point Road. But it does not so appear. It is

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in proof, however, that the defendant received the hogs so crowded in cars that it was dangerous to carry them. This receiving was an act of the defendant. To attempt to transport the hogs so confined was a wrong on its part, a breach of its duty as a carrier. Can a carrier, who is one of a connecting line of carriers, relieve himself from liability by saying that he received the goods from a preceding carrier, so packed in the car or vehicle in which he himself is going to carry them, that they were obliged to be injured in the transportation? If the goods themselves are not in good order, have been already injured, that is one thing; but the loading or packing them in the cars so that it may produce damage is quite another and different matter. The carrier has full control over this. If the last carrier who receives them finds that they are not in good order, that damage has already occurred, he can protect himself. It might be his duty to receive them in such order and to deliver them—that is, he may be compelled to receive even damaged goods—but he is not bound to receive them when they are so badly packed that they cannot be removed without loss: *Breed vs. Mitchell*, 48 Georgia, 533. So the defendant was not bound to receive these cars from the Atlanta and West Point Railroad with the hogs so crowded that they were in danger from suffocation. If it did, it made the act of that road its own act, and was bound for the damages resulting from it. And the burden is on it to show whether the suffocation occurred before or after its receipt of such cars. Section 2084 of the Code says that where there are several connecting railroads under different companies, and the goods are intended to be transported over more than one railroad, each company shall be responsible only to its own terminus and until delivery to the connecting road; the last company which has received the goods “as in good order” shall be responsible to the consignee for any damage, open or concealed, done to the goods; and such companies shall settle amongst themselves the question of ultimate liability. The “good order” mentioned in this section hardly means the manner in which goods are

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packed or stowed in the car. As stated before, if the goods themselves be in bad order or be damaged, the last road, or indeed any road, can so specify in its receipt and be protected. But if it were to say in its receipt that it received cars from another road loaded with live hogs, full packed one above the other, it would not be entitled to claim that the road so crowding them was alone responsible for all damages. Such last road should either demand that the manner of the loading be changed and other cars added, or should do so itself. It not only would not be bound to receive and ship cars so packed, but it would be its duty either to refuse or to have the proper changes made. If, then, a carrier can protect himself against liability for the receipt of goods in bad order—in an unmerchantable condition—or not so prepared for transportation by the shipper as to be safely carried, and also has full control over the manner in which they shall be put aboard his carriages, or those which he makes his own by receiving and adopting them, he should not have the right to set up in his defense that another has acted wrong, when by his continuance of that wrongful act damage has probably ensued. At least the burden is on him of showing that it was not by his default or his own negligence, thus proved, that the injury was caused.

Judgment reversed.

DOCTOR B. LENOARD *et al.*, plaintiffs in error, vs. JOHN J. COLLIER, defendant in error.

1. When a suit was brought against A and B, administrators of C, and against D as security for C, on a promissory note made by C, as principal, and D as security, and a verdict taken for the plaintiff for the amount due on the note, but the judgment was entered up simply against the defendants, and contained no words providing that it should be levied on the goods and chattels, lands, etc., in the hands of A and B, as administrators, etc., and execution issued against A and B, as administrators simply, and against D as security :

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Held, that the judgment was not void, but only irregular, and might be so amended as to conform to the declaration and verdict.

2. A bill in equity will not, in this state, lie to enjoin an execution on the ground that the judgment and execution do not follow the declaration and verdict. The remedy is at law by affidavit of illegality, or by motion in open court to amend.
3. No second affidavit of illegality will lie for a defect or irregularity in a judgment and execution, unless it appears that such defect was unknown to the affiant at the time of the filing of the first affidavit, and if the sheriff refuses to receive such second affidavit, equity will not interfere to restrain the levy of the execution.

Administrators and executors. Judgment. Amendment. Injunction. Illegality. Before Judge HILL. Sumter County. At Chambers. August 1st, 1874.

John J. Collier filed his bill against Doctor B. Lenoard and Spencer C. Pryor and Sheppard G. Pryor, administrators of Benjamin F. Pettee, deceased, and William Graham, sheriff of Sumter county, making, in brief, the following case :

On January 4th, 1859, one Benjamin F. Pettee, since deceased, and whose estate is represented by Spencer C. Pryor and Sheppard G. Pryor, as administrators, gave his promissory note to "James Fleming, guardian for D. B. Lenoard or bearer," for \$670 20, upon which complainant became security, he having no interest in the same. The consideration of said note was negro slaves. Some time in the year 1866, one Doctor B. Lenoard having become the owner of said note, instituted suit against "Spencer C. Pryor and Sheppard G. Pryor, administrators of Benjamin F. Pettee, deceased," and complainant, as security. On May 9th, 1867, said Lenoard obtained judgment in said suit against "the defendants" therein. Said judgment was not against the goods and chattels, lands and tenements, of the said Benjamin F. Pettee in the hands of the said administrators, but simply against the administrators individually. The execution issued against "Spencer C. Pryor and Sheppard G. Pryor, administrators, etc., and J. J. Collier, security." There were plenty of assets in the hands of said administrators belonging

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to said deceased at the date of said judgment, and since, to discharge any legal claim against said estate. The verdict, judgment and execution are void under the provisions of section 3573 of the Code. On January 8th, 1870, the execution aforesaid was levied upon the property of complainant, who interposed an affidavit of illegality to the effect that the consideration of said claim was in part the hire of slaves. On February 1st, 1874, said plaintiff dismissed said levy without ever having had a trial upon said issue. On July 15th, 1874, a second levy was made upon the property of complainant, who thereupon tendered an affidavit of illegality, setting up the following grounds:

1st. Said judgment is dormant, it having been rendered on May 9th, 1867, and no levy made under the execution based thereon until July 15th, 1874, more than seven years.

2d. Said judgment is void because it is against Spencer C. Pryor and Sheppard G. Pryor, administrators, simply, and not against the goods and chattels, lands and tenements of the deceased, in their hands to be administered, as required by section 3573 of the Code.

3d. Said judgment is void because against the defendants jointly, whilst the character of complainant as security, in which he was sued, is not specified.

The sheriff refused to accept said illegality, and now threatens to sell said property under the illegal proceedings aforesaid. Prayer, that the defendants, Doctor B. Lenoard and William Graham, sheriff, be enjoined from proceeding under said levy until the further order of the court. That said administrators be required to answer as to the amount of assets belonging to the intestate in their hands, and when ascertained, that they be enjoined from selling the same. That the claim of the defendant, Doctor B. Lenoard, be decreed to be paid by said administrators out of the assets of their intestate.

The defendant, Lenoard, answered the bill. His answer is omitted as not tending to illustrate the decision.

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The chancellor ordered the injunction to issue as prayed for. To this ruling defendants excepted.

C. T. GOODE, for plaintiffs in error.

No appearance for defendant.

MCCAY, Judge.

1. The original declaration and the verdict by the jury in the common law suit are perfectly regular. The declaration is against the two Pryors, administrators of Pettee, and against Collier, as security, and the cause of action set forth shows that it was a suit against the administrators, as such. Under our Code, the administrators of a deceased co-promissor may be joined with the survivor in a suit on the promise: Code, section 3348. So the verdict is regular. It is against the defendants. It is not usual in this state to specify in the verdict of the jury the character of the defendants, unless there be some issue on that character. There was here no plea, and the verdict is a finding of the jury in favor of the plaintiff on all the allegations of the declaration, and a judgment may, on such a verdict, be entered up according to the allegations. Without doubt the judgment is defective. It fails to charge the Pryors, as administrators, and to direct that the money shall be made *de bonis testatoris*, and it does not describe Collier as security. In both these respects, it fails to comply with the law: Code, section 3573. But is the judgment for this reason void? We think not. A judgment upon a verdict is a mere clerical act of the plaintiff's attorney, and if it fails to conform in any way to the verdict, it is amendable. It is the every day's practice of the courts to permit this, and it is expressly and in terms allowed, even after execution issued, by the Code, section 3494. Nay, it is the every day practice to enter up a judgment *nunc pro tunc* even where there is no judgment. The test as to what defects make a proceeding void, and what are mere irregularities, is whether the defect is amendable.

It is therefore clear to us that this judgment is not void but only irregular, and capable of being amended.

2. The defect—and it is a defect—both in the judgment and execution, is the subject of an affidavit of illegality. The execution has issued illegally if it has no proper, regular judgment to depend upon, and may be stopped by affidavit of illegality, or the judgment may be set aside if not amended by motion in open court: 19 *Georgia*, 579; 26 *Ibid.*, 162; 39 *Ibid.*, 565; and so the defendant seems to have thought, as his bill is founded on the fact that the sheriff refused to receive his affidavit and stop the proceedings. Was the sheriff right in this? Under the allegations in the bill, as well as by the statements of the answer, it appears that this is the second affidavit that the defendant has filed to the execution.

3. The thirty-first rule of court “provides that no second affidavit of illegality shall be received by the sheriff or other officer,” and this is a salutary rule. If a defendant may stop a levy by an affidavit, he ought to take all the grounds that exist. He cannot bring up the various objections there may be to an execution in different installments. It would create interminable delays, and besides it is a rule in all legal proceedings that if a party takes steps after an irregularity of his opponent, he is ordinarily held to waive it. The sheriff was not in the wrong for refusing to receive the affidavit. To do so he would have violated a rule of court. Had this bill stated that this defect in the proceedings had not been discovered by him when his first affidavit was filed, we incline to think the sheriff ought to have received the affidavit. The rule of court can fairly be taken to mean that a second affidavit may be filed on the happening of a new ground or on the discovery of a new fact. Even an amendment of an affidavit may be made to insert new grounds, if the defendant will swear that he did not know of the grounds when the original was filed, and the rule of court is perhaps fairly to have that qualification, or a qualification that he did not know of the ground until after the first

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affidavit was disposed of. Perhaps in this very case he did know of them, and he is resorting to a bill in equity to get rid of the consequences of his own negligence. If a man, knowing of several defects in a judgment, attacks it upon one ground by an affidavit, he cannot, when his objection is met, attack it on another by a new affidavit, and this is a sound rule of public policy. As there was no final judgment on the first illegality, the defendant is not estopped from moving an amendment of the judgment or moving the court to set it aside and forcing the plaintiff to amend. He makes no excuse in the bill why he has not done this. If he did not know of the defect, he can now file his illegality—if he did, he presents no claims for interference by equity. His trouble is his own fault. He owes the debt; he put his name to the paper, and the plaintiff has a right to collect the money out of him alone. For these reasons we think the complainant was not entitled to an injunction on his own showing. His remedy was at law by affidavit or by motion. If he cannot swear to the facts necessary to make an affidavit which the sheriff ought to receive, he may move in open court. But the same reason which makes it improper for him to get a second stay by affidavit makes it improper for equity to interfere. It is his own fault, if he knew the defect, and did not insert it in his first affidavit. We recognize that this judgment and execution are wrong. But they may be amended. The plaintiff may amend, or Collier may himself pay the money and move to amend, so as to use the *fi. fa.* to reimburse himself.

Judgment reversed.

Ex parte JESSE J. BRADFORD, Clerk, and HUGH G. IVEY,
Sheriff, of Muscogee County.

1. The act of March 2d, 1874, pamphlet page 90, in these words, to-wit:
"Be it enacted, that the law passed by the general assembly and approved December 18th, 1871, providing that compensation should be

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made to ordinaries for services in relation to county business, and to sheriffs and clerks of the superior court for services in relation to which existing laws provide no adequate compensation at all, etc., etc., be and the same is hereby repealed," indicates an intention in the general assembly to repeal all laws authorizing such compensation, and the act of 1862, Irwin's Code, section 3645, making substantially the same provisions, but providing a different mode for ascertaining such compensation, is not revived by such act of March 2d, 1874.

2. Persons performing any service for the county, which in its nature creates a debt against the county, have the same method of seeking compensation as have other creditors of a county, to-wit: by application to the ordinary or county commissioners, or by suit at law.

County matters. Clerk. Sheriff. Costs. Before Judge JAMES JOHNSON. Muscogee Superior Court. May Term, 1874.

The clerk and sheriff of the superior court of Muscogee county petitioned the said court substantially as follows:

They present the annexed bills of items, for which they claim that they are entitled to be paid under the provisions of the statute authorizing the judge of the superior court, in certain cases, to allow extra compensation to clerks and sheriffs. They show that for a time this power was vested in the grand juries, but under the law as it now stands the power is in the judge of the superior court alone. They therefore ask such compensation as the court may think just and proper after hearing the evidence which the petitioners now offer to submit.

To this petition were attached two itemized accounts against the county of Muscogee, one in favor of the clerk and the other in favor of the sheriff.

The presiding judge declined to hear any testimony under said petition, holding that the act of 1862, (Irwin's Code, section 3646,) was repealed, and that he had no power to allow extra compensation as provided for in the same. To this ruling petitioners excepted.

R. J. MOSES; INGRAM & CRAWFORD, for plaintiffs in error.

No appearance *contra*.

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McCAY, Judge.

It seems to us very plain that it was the intention of the legislature, by the act of March 21, 1874, to cut up by the roots the system introduced, first by the act of December 12th, 1862. Previously to that date there was no law to authorize sheriffs, clerks, etc., to be paid for extra service in the performance of any official duty. The duties cast on them for which no compensation was specially provided were burdens on the office, and the law-makers considered that the compensation received in the shape of costs and from private persons, full remuneration for the public duties required by the officer. Our old inferior court served without pay altogether; so of our road commissioners and militia officers; so may duties of a magistrate be without remuneration, as the duty to hold elections, to make out a list of tax-payers, etc. The act of 1862 changed this view of the matter, and recognized the right of the clerks and sheriffs to be paid for services, summoning juries, etc. The act of December 13th, 1871, keeps up the same idea, and includes ordinaries as one of these officers. True, it changes the mode in some respects by which the funds are to be raised and the claims audited. The act of March 2d, 1874, does not simply repeal the mode of audit nor change the mode of raising the funds, nor does it simply repeal the act of 1871 by its title. It declares that the act of 1871, that compensation shall be made to these officers, is repealed. It is noticeable, too, that it is only the act of 1871 which includes ordinaries. We do not think it reasonable to suppose that the legislature intended to deny this right of compensation to ordinaries and permit the clerks and sheriffs to have it, as we all know that since 1868 the ordinaries have far more of such duties than either of the other officers. As we have said, the language of the act of 1874 is very significant of an intention to take away the right altogether, to leave the whole matter as it stood before the innovation of 1862. It does not say that the mode of audit provided by the act of 1871 is repealed, but that the

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act "providing that compensation shall be made be and is hereby repealed." For these reasons we think the act of 1862 was not revived.

Judgment affirmed.

THE NEWTON MANUFACTURING COMPANY, plaintiff in error, *vs.* H. & T. M. WHITE, defendants in error.

1. Where one buys cotton, stored in a certain house, which he is to remove, and in so doing gets other cotton belonging to the seller stored in another house, the owner in suing for such last mentioned cotton is not compelled to bring an action in *tort*, but may sue in *assumpsit*.
2. The measure of recovery in such an action is the value of the cotton at the time it was taken by the defendant, with interest.
3. If the claim sued for be solely for cotton taken from a certain house, and the testimony relied on for a recovery be confined to that, and the jury be exclusively restricted to that in considering their verdict, then a judgment in favor of plaintiffs *vs.* defendant, rendered in another action for cotton obtained at another and different place, is irrelevant testimony.
4. If it be not clear that the cotton sued for, or any part thereof, is not covered by such judgment, then the same should be admitted and the question of former recovery left to the jury.
5. To make the sayings of an agent admissible in evidence against the principal, it should appear that they were made whilst in the prosecution of the enterprise to which they refer.

Pleadings. Sale. Damages. Evidence. Former recovery. Principal and agent. Before Judge HALL. Newton Superior Court. September Term, 1873.

H. & T. M. White brought *assumpsit* against the Newton Manufacturing Company for \$31,250 00, besides interest, alleged to be due for sixty-two thousand, five hundred pounds of ginned cotton, had and received from the plaintiffs. This cause of action was set out in various ways by different counts, not material here. The defendant pleaded the general issue.

The evidence for the plaintiffs presented the following case:

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In the early part of the year 1865 the plaintiffs had cotton stored at three different places in Newton county, to-wit: the "Heard place," the "Holcombe place," and in a warehouse on the Alcora river. Prior to January 1st, 1865, Hugh White, one of the plaintiffs, on his individual account, exchanged with the defendant sixty-two thousand five hundred pounds of the cotton stored at the first two of the above mentioned points, for a like amount at the Ocmulgee Mills. By an arrangement with T. M. White, a sufficient amount of the cotton stored as above indicated, to meet the obligations of the above trade, was turned over to Hugh White. In January, 1865, the defendant commenced hauling the cotton away. In 1864, when the plaintiffs were preparing to return their property for taxation, they counted the bales at the river warehouse, and found that they had one hundred and twenty-eight bales, averaging in weight four hundred and sixty-eight pounds. In the summer of 1866, desiring to use the cotton, they ascertained that there were only eighty-eight bales there. The plaintiffs had no personal knowledge as to what became of the missing forty bales, except as to four. They consented for the defendant to take these four bales upon one occasion when it was in need of cotton for manufacturing purposes, and that at the Holcombe place was too wet; but special notice was then given to the defendant that this was the cotton of the plaintiffs and not of Hugh White. When the cotton was missed, the plaintiffs interrogated William F. Davis, the agent of the defendant, as to it. He stated that the defendant had taken a good deal of cotton from the river warehouse. From April 1st, 1865, to 1868, Davis was in the employment of the defendant, marking and shipping goods, buying cotton, settling with hands, etc. In the fall of 1866 a full settlement was demanded from the defendants by the plaintiffs of all their business matters, including the cotton in controversy in this suit. Objection was made upon the ground that the cotton taken from the river warehouse and the "Perry cotton" constituted a portion of that for which it had exchanged. The

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river warehouse was nearer to the defendant's factory by half a mile than the Heard and Holcombe places. At the time of the demand for a settlement cotton was worth thirty cents per pound; in January, February and March, 1865, it was worth \$1 00 per pound in Confederate money. The river warehouse was fastened by plank nailed across the door. The floor was of plank and puncheons held down by the cotton placed upon them. When the cotton was missed, there were signs of its having been taken out from below.

The evidence for the defendant will not illustrate any of the questions of law presented. The errors complained of sufficiently appear in the motion for a new trial.

The jury found for the plaintiffs \$8,493 00. Whereupon the defendant moved for a new trial upon the following grounds, to-wit:

1st. Because the court erred in admitting in evidence the sayings of William F. Davis concerning the obtaining of cotton from plaintiffs' river warehouse.

2d. Because the court erred in rejecting the record of a former action of assumpsit between the plaintiffs and defendant, in which the former recovered from the latter \$3,117 68 for the Perry cotton.

3d. Because the court erred in refusing to charge the jury "that if the cotton of plaintiffs was forcibly taken by the defendant from the warehouse of plaintiffs without authority, such taking was a trespass, and there can be no recovery for such cotton under the pleadings in this case."

4th. Because the court erred in refusing to charge the jury "that if the plaintiffs can recover, the measure of damages should be only the value of the cotton at the time of the taking, with interest."

5th. Because the court erred in charging the jury "that though it was a trespass for defendant to take plaintiffs' cotton from their river warehouse without authority, yet the plaintiffs could waive the *tort* and recover in this form of action for the cotton so taken, and the measure of damages

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should be the value of the cotton at the time a settlement was demanded, with interest."

6th. Because the verdict was contrary to the law and the evidence.

The motion was overruled and the defendant excepted.

P. L. MYNATT; J. J. FLOYD; A. T. AKERMAN, for plaintiff in error.

CLARK & PACE; PEEPLES & STEWART; A. M. SPEER, for defendants.

TRIPPE, Judge.

The third, fourth and fifth grounds in the motion for a new trial will be first considered. They present two questions: 1st. Can the action of assumpsit, under the facts of the case, be maintained, or should it have been in trover or trespass? 2d. If assumpsit can be sustained, what is the measure of the recovery?

1. Section 2955 of the Code says "when a transaction partakes of the nature both of a *tort* and a contract, the party complainant may waive the one and rely solely upon the other." Is not this a transaction of that sort? There was a contract for the sale of cotton stored in one warehouse, which the buyer was to remove. In doing so, it is charged that he got cotton which was in another house. The value of this last cotton is claimed in this action. Here, then, there was a contract, and one party in carrying it out committed a breach of it. It is not by any means as strong a case as *Blalock & al. vs. Phillips*, 38 *Georgia*, 216, in which it was held that the plaintiffs could waive the *tort* and sue on a contract express or implied: See, also, 17 *Georgia*, 103. It has been held, that where "a person buying three pieces of goods has double pieces delivered to him by mistake, and takes them away, the vendor may recover the difference of value, if not under a contract for goods sold and delivered, still under that for money had and received:" 1 *Stephens' Nisi Prius*, 276, note

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c. Chief Justice TINDAL, in *Young vs. Marshall*, 8 Bingham, 43, lays down the broad principle as one generally known and acknowledged in Westminster Hall, "that a party is not bound to sue in *tort* where, by suing in contract, he produces no injury to the defendant." In this case the action of assumpsit was a benefit rather than an injury to the defendant, as appears from the next question upon the point of the measure of damages.

2. As to the measure of plaintiffs' recovery in this form of action, we think there was error in permitting that to be fixed by the value of the cotton at the time a demand may be made for a settlement. Had trover been brought, the jury would have had a large margin. They could have given the highest value proven down to the time of trial. But if so, no interest could have been allowed. It is stated in the head-note that the measure of recovery in this case was the value of the cotton at the time it was taken by the defendant, with interest. It was so held in the analagous case in 38 *Georgia*, 216, already referred to. Here the plaintiff relies upon a contract express or implied, or upon a breach of contract. In such a case, where an amount ascertained would be the damages at the time of the breach, it may be increased by the addition of legal interest from that time till the recovery : Code, section 2945.

3. The defendant offered in evidence the record of another suit in favor of plaintiffs against the defendant, in which there was a recovery by the former of \$3,117 68. The court rejected the testimony. The object of the evidence was to show that the cotton now sued for was covered by that judgment. If the claim in the action on trial be solely for cotton taken from a certain house, and the testimony relied on be confined to that, and the jury restricted to such cotton in considering their verdict, then a judgment in another action for cotton obtained at another and different place, or in other words, for other cotton, is irrelevant testimony, and cannot affect this case.

4. But if it be not clear that the cotton sued for, or any



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part thereof, is not covered by such judgment, then the record should be admitted, and the question of former recovery be left to the jury, under all the proof in the case.

5. The sayings of Davis, the agent of defendant, as to cotton having been received by the defendant, which came from the river warehouse, was admitted over objection by defendant's counsel. Plaintiff's action was for cotton which he alleged had been taken from that house, when the defendant was entitled only to that which was stored in another house. The controversy was on that point. To prove it, the sayings of the agent, made some eighteen months after the cotton is said to have been taken, were admitted in evidence. Were they competent? We think not. The agent is living, and was sworn on the trial. It is provided in the Code, section 2206, that "the declarations of the agent as to the business transacted by him are not admissible against his principal, unless they were a part of the negotiation, and constituting the *res gestæ*, or else the agent be dead." This is but an affirmation of the ancient rule, and often recognized by this court: 24 *Georgia*, 211; 26 *Ibid.*, 11; 29 *Ibid.*, 399 and 461. The case in 26 *Georgia*, 11, was whether the sayings of a conductor of a railroad train, whilst still in office, were admissible as to a past occurrence happening on his train. It was held they were not. In *Sweetwater Manufacturing Company vs. Glover*, 29 *Georgia*, 399, the sayings of two of the chief agents of the company, one the principal agent and the other a superintendent of the hands, with other powers, were admitted against the company on the trial in the superior court. Upon a review of the case in this court, it was said in the decision granting a new trial and reversing the holding on this point, "that neither these nor any other agent of the company could say anything to bind them except what he says about his appointed business while he is doing it. It must be said about his appropriate work, and said *dum ferret opus*. * * * The principle on which an agent's sayings are admitted against his principal at all, is, that they are part of the *res gestæ*." These decisions and the long set-

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bled rule, must determine the question made on this point in this case, although Davis, the agent, was superintendent at the time the declaration is alleged to have been made. The transaction was over—eighteen months had passed—and no agent, after that length of time, can, by a mere declaration, impose a liability on his principal, and by that declaration establish a fact on which a recovery is to be had.

Judgment reversed.

THE SOUTHWESTERN RAILROAD COMPANY, plaintiff in error, vs. THE ATLANTIC AND GULF RAILROAD COMPANY, defendant in error.

1. The mere fact that a railroad company, located within this state, sent iron to which another company claimed title, beyond the state, without any fraudulent practices or concealment on the part of the former, debarring or deterring the other from its action, does not disable such first mentioned company from asserting a title by prescription to the iron when sued for it in an action of trover by the other.
2. If the right of action on the part of the plaintiff existed all the time, and there was no disability preventing its assertion, produced by the fraudulent acts of the defendant, or resulting from any cause recognized by law, then the right of reclamation as meant by the Code, continued without interruption, and the true intent and meaning of the provisions of the statute on the subject of title by prescription to personal property, are preserved by allowing defendant to assert such a right.
3. A contrary construction would not only give the plaintiff in such a case a perpetual right of action, of which he could avail himself at pleasure, but if the property were to be consumed or placed beyond the power of the defendant so that he could not return it within the state, whatever might be his good faith, he could never claim repose even against a doubtful right.
4. Whilst it is competent for the officers of a corporation to state, as witnesses, that the company never had knowledge or notice of a certain fact, such testimony is not conclusive upon that point, and if the other party wishes to show that the statement is a mere conclusion of the witness, he can do so by cross-examination.
5. When counsel on both sides have entered into a written agreement as to certain facts, it is not competent on the trial for the party who

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introduces such statement to the jury, to prove a fact contrary to what it is stated to be in the agreement. To avail himself of this right proper notice should be given.

Railroads. Trover. Prescription. Evidence. Principal and agent. Corporations. Evidence. Practice in the Superior Court. Before HENRY WILLIAMS, Esq., Judge *pro hac vice*. Bibb Superior Court. October Term, 1873.

This was an action of trover for the recovery of one hundred and fourteen and one-fourth tons of railroad iron, known as the T rail, brought by the Atlantic and Gulf Railroad Company *vs.* the Southwestern Railroad Company.

The facts, were as follows: In 1862, one J. G. Minor, as the agent of the Confederate States Government, seized a large lot of T railroad iron bars belonging to the plaintiff, and at the time lying in piles on or near its track. Minor did not value or pay for this iron, but very soon after its seizure let Isaac Scott have the whole, on his agreement to deliver a like quantity of old railroad iron, in bars, in lieu of it. Isaac Scott sold to the defendant one hundred and fourteen and one-fourth tons of this iron for a like quantity of old railroad iron bars, and the additional sum of \$32 00 per ton, to be paid in money. The defendant delivered its old iron rails to the same amount, and paid the price agreed on as the difference, in Confederate treasury notes, to Isaac Scott, and received the new iron rails in the latter part of the year 1862, say in December of that year. The iron was delivered to the defendant, in its yard in Macon, on the cars of the plaintiff, where it remained until some time in August, 1864, when the defendant loaned some sixty to eighty tons of the iron to the Montgomery and West Point Railroad Company, in Alabama, to lay down on its track, to be returned when called for; it was then carried into Alabama for that purpose. It has never been returned or paid for. The balance of the iron remained in the yard until it was seized by the Federal army, some time in 1865, to repair the State Road.

The president of plaintiff, Mr. Screven, was absent in the

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army when this iron was seized and carried off; in 1866 he sent out the treasurer to look up the iron, and on inquiry, he found that a portion had been received by the defendant. Mr. Lovell, as the attorney of the plaintiff, called on Mr. Powers, superintendent of the defendant, for information as to this iron, in 1866, when he was shown the books of the road in relation to the iron; he was then informed by Mr. Powers when the iron was received, how it was obtained, who from, and as to all facts he desired. In that conversation nothing was said as to the removal of the iron, or any part of it, out of the state, but information given as if the iron was still in possession and use of defendant.

There was no consent to the seizure by the plaintiff. Suit was not brought until 1868.

The defendant pleaded title by prescription.

In the course of the trial, the following paper was introduced :

"THE ATLANTIC AND GULF RAILROAD COMPANY *vs.* THE SOUTHWESTERN RAILROAD COMPANY—*Trover.*

"It is admitted that the Southwestern Railroad Company is in possession of one hundred and fourteen and one-fourth tons of the iron sued for in this action; that it was illegally seized by the Confederate government in 1862, without the consent of the plaintiff, and that plaintiff has not been paid for the same by any one, and that defendant purchased it from Isaac Scott in November, 1862, for value, and it has been in the actual possession of the same from 10th December, 1862, to the present time, the defendant all the time using and claiming the same as its own property; all questions as to any knowledge by the defendant at the time of its purchase of the plaintiff's title to the property being left open to other proof.

R. F. LYON,

"Defendant's Attorney."

"JOHN M. B. LOVELL,

"Attorney for Plaintiff."

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The jury found for the plaintiff. The defendant moved for a new trial, upon the following grounds, to-wit:

1st. Because the Court erred in refusing to charge, without qualification, as follows: "If the defendant purchased this iron for its full value, from Isaac Scott, on the 10th December, 1862, then got possession of the same, all without any fraud or concealment of the same, and has, from that time to the commencement of this suit, continued in the actual possession thereof, all the time claiming and using the same as its own property, then the defendant's title to this iron by prescription is complete, and the plaintiff cannot recover." And in charging said request with the following qualification: "If, after the defendant purchased and acquired the possession of this iron, any time before the expiration of four years from the commencement of such possession, it was removed by any one out of the state of Georgia, then the defendant's possession could not ripen into a title by prescription as to such of the iron as was so removed out of the state."

2d. Because the court erred in charging the jury as follows: "If you find as to this property, or any part of it, concealment, removal from the state, or that it was so placed as not to be subject to reclamation, or fraud in the original taking of the property by the defendant, or fraud, deterring the plaintiff from its action at any time after the accruing of plaintiff's right of action, title by prescription is not complete. In the last case the right of action accrues from the time of the discovery of the fraud."

3d. Because the court erred in permitting John Screven, president of the Atlantic and Gulf Railroad Company, to testify as follows: "In 1866 the first knowledge was brought to the company of the disposition of said iron."

4th. Because the court erred in admitting any evidence, over the objections of defendant, as to the seizure of the iron, its use, what was done with it, etc., except its value, and the knowledge by the defendant, at or before its purchase, of the illegal seizure, or of the title of the plaintiff to it, after the introduction of the written agreement between counsel, which

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was put in evidence immediately after the close of the examination of the president, John Screven.

The motion was overruled and defendant excepted.

LYON & JACKSON; JACKSON, LAWTON & BASINGER,
for plaintiff in error.

HARTRIDGE & CHISHOLM; LOVELL & FALLIGANT, for
defendant.

TRIPPE, Judge.

1, 2, 3. The provisions of the Code on the subject of title by prescription to personal property, applicable to this case, are as follows: Adverse possession of personal property within this state for four years shall give a title by prescription. No prescription arises if the property be concealed, or removed out of the state, or otherwise is not subject to reclamation. A prescription does not run in cases of fraud debarring or deterring the other party from his action, until the fraud is discovered: See Code, sections 2685 and 2688. Before the adoption of the Code, and the substitution of these provisions for those in the statute of limitation, it was prescribed by that statute that all suits for the recovery of personal property or for damages for the conversion of it, shall be brought within four years after the right of action accrues and not after. The exceptions—akin to those given in the law of prescription—were, that where any person against whom a right to sue existed, should remove from this state, the time should cease to be computed in his favor from the time of such removal and so continue until he should return and fix his residence in this state. Also, where the property should be carried away and secreted so that the owner did not know who was in possession of it, on where it was, or against whom to bring his suit, the statute ceased running until the property was discovered, or who was in possession of it: Acts of 1855-6, page 233. There was also a provision on the subject of fraud substantially like that in the present law of prescription. The de-

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defendant in this case is a railroad company, located in this state, was liable to be sued, and could have been sued at any time after it received the iron now claimed; and the question is, did it lose all right to assert title to the iron by prescription, because it was sent, or loaned, or sold, so that it was taken out of the state? The court charged, that as to the portion that was taken to Alabama, no prescriptive title could be asserted, and a verdict was found for that much of the iron. We think there was error in the charge. Under the statute of limitation, we are not aware that it was ever held, that, because property for which a party was sued had been carried beyond the state, whilst the defendant resided here all the time, and there had been no secreting or concealment of it, nor other fraud, so that the claimant did not know against whom to bring his suit, the defendant thereby lost all benefit of the statute. Did the change of the law from one of limitation to one of prescription, radically revolutionize such an important feature as this? Before the adoption of the Code, it will not be questioned, that unless fraud of some sort were shown which prevented plaintiff from suing, the defendant could have protected itself under the statute of limitation, although the iron had been sold and carried out of the State. The words of the Code are: "No prescription arises if the property be concealed, or removed out of the state, or otherwise is not subject to reclamation." Do not these last words furnish a key to aid in the construction of the whole provision? Why should the statute cease to operate if reclamation be all the time at the command of the claimant? A party may have reclamation without obtaining the specific article or property. Webster defines reclamation to mean, "Recovery. 2. Demand; challenge of something to be restored; claim made." If reclamation means a regaining of the property itself, then if the property be perishable and die, or is consumed, a defendant in such a case could never claim the benefit of the statute. So, if the property was to be destroyed, or placed beyond the power of the defendant to return it within the state, there would be a perpetual right of action against him,

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and whatever might be his good faith he could never have repose even against a doubtful claim. We think the true construction of the law on this matter is, that if the right of action on the part of the plaintiff exist all the time, and there be no disability preventing its assertion produced by the fraudulent acts of the defendant or resulting from any cause recognized by law, then the right of reclamation as meant by the Code continued without interruption, and the true intent and meaning of the provisions of the statute on the subject of title by prescription to personal property, are preserved by allowing the defendant in such a case to assert such a right.

4. Objection was made to the statement made by officers of plaintiff's company, that the company never had knowledge or notice of certain facts. We think this was competent evidence. Really, it is about the only way they could prove such a fact. Of course it is not conclusive, and if the other party claim that this statement is merely a conclusion or opinion of the witness, he can show it to be so by cross-examination or other evidence.

5. As to the question involved in the last point, it is sufficient to say that it need not arise on another trial, and that the rule established in *Wallace vs. Matthews*, 39 Georgia, 617, and in *Hargroves vs. Redd*, 43 Georgia, 142, will be a guide, as they set forth the correct principle to govern in such cases.

Judgment reversed.

B. H. & A. M. THRASHER, plaintiffs in error, vs. JOHN S. BETTIS, defendant in error.

(TRIPPE, Judge, was providentially prevented from presiding in this case.)

Where an application was made for a homestead, and the applicant returns in his schedule several parcels of land, but specially prayed that his homestead might be assigned him in a certain house and lot in a city, stating that there was a mechanics' lien upon it for \$500 00, which was valued by the surveyor at \$2,000 00, and objection being made as

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to the value, commissioners were appointed, who appraised the house and lot at \$2,800, which was duly returned and filed and approved, and no appeal taken, and the ordinary made the usual order, requiring that if the city lot should be sold under legal process, the \$2,000 should be invested in other property, and at the same time appointed a receiver to sell the other real estate, and bring in the proceeds for distribution to the creditors, and before the distribution was made the house and lot was sold, and only brought \$2,000 00:

Held, that the return of the appraisers and approval of the ordinary, unappealed from, was conclusive upon the applicant, and that he cannot claim to have any portion of the fund raised by the receiver used to pay off the lien, and thus leave to him the full \$2,000 00.

Homestead. Before Judge HOPKINS. Fulton Superior Court. April Term, 1874.

Bettis, by his petition for *certiorari*, made the following case: In February, 1874, he applied to the ordinary of Fulton county for an exemption of personalty and a homestead in realty. The latter he prayed might be set apart in a house and lot on Decatur street, in the city of Atlanta, and in certain other property. The surveyor appointed valued the said house and lot at \$2,000 00 in specie. B. H. & A. M. Thrasher objected to this valuation. Appraisers were accordingly appointed, who estimated it as worth \$2,800 00 in specie. The ordinary, accordingly, on January 31st, 1874, passed an order that in case of the sale of said property under execution, \$2,000 00 in specie, from the proceeds thereof, should be invested in a homestead for petitioner. There were, and still are, incumbrances upon said property for the labor done and material furnished, to the amount of from \$500 00 to \$600 00. The schedule of the petitioner embraced other real estate, which the ordinary placed in the hands of a receiver for sale, the proceeds to be distributed among the creditors. Such sale has been made, and the receiver has placed at the disposal of the court a net balance of \$280 00. The property upon which petitioner's homestead was located was sold at April sales, 1874, for \$2,000 00 in currency. On the 10th of the said month the petitioner asked that the ordinary pass an order allowing the proceeds of the

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sale of the homestead property, after payment of expenses and incumbrances, to be placed in the hands of some discreet person, to which should be added a sufficient sum from the amount realized by the receiver, to make the sum of \$2,000 in specie, which should be invested by him in a homestead for the applicant.

On objection made by B. H. & A. M. Thrasher, the ordinary refused to allow the fund brought into court by the receiver to be applied in the manner indicated. To which ruling the petitioner excepted.

The petition was sanctioned and the writ of *certiorari* issued. The answer of the ordinary did not alter the case as above presented. The court sustained the *certiorari*, and B. H. & A. M. Thrasher excepted.

THRASHER & THRASHER, for plaintiffs in error.

COLLIER & COLLIER; T. P. WESTMORELAND, for defendant.

MCCAY, Judge.

In our judgement the return of the appraisers, the approval of the ordinary, and the passing by him of the orders, was a setting apart of his homestead to the applicant, and an appropriation of the remainder of the debtor's land to the creditors. The house and lot were valued at \$2,800 00, this not only gave him his homestead, but allowed for the lien, and left still an interest subject to sale, of \$300 00. Had the debtor been dissatisfied with the return and orders of the ordinary, he had his remedy. He took the house and lot as his homestead in view of, and with the understanding that it was worth \$2,800 00, and in our judgment, he is bound by that judgment. He applied for, and got his homestead, in that particular property. The only reason why it was allowed to be sold, was that by the return it was treated as worth more than \$2,000 00 besides the lien. It is merely accidental that it has been sold before the proceeds arising

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from the sale of the other real estate was distributed. The same judgment which gave him his homestead, devoted the other to the creditors, at least, they were had at the same time; they or he might have appealed. Neither of them did. We think it is the clear intent of the law, that the return of the appraisers and the order of the ordinary, in view of the fact that the property is adjudged to be worth more than \$2,000 00, recognizing the right of judgments to sell it and protecting the homestead interest when sold, is the laying off of the homestead, and that it is too late to revise that judgment. If this were allowed the matter would be always open, since, as we have said, it is merely accidental that the sale has occurred so soon. It might be ten years before the sale; it might be for new debts.

Judgment reversed.

S. P. GOODWIN *et al.*, plaintiffs in error, vs. THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH, defendants in error.

1. A tax levied by the mayor and council of Savannah on the business of a common carrier within the city is not illegal or unconstitutional, because the tax is graduated according to the number of drays, carriages, wagons, etc., used in such business.
2. If some of the complainants, seeking an injunction to restrain the collection of a city tax, show in their bill that they do not come within the provisions of the ordinance assessing the tax, and are in fact not liable therefor, relief may be had by illegality, if the attempt is made to collect the tax from them, and there is no necessity for equity to intervene by a restraining process.
3. Where the enforcement of different sections of a city ordinance assessing taxes is sought to be restrained, and one of the sections is in fact obnoxious to the complaint made against it, but is subsequently repealed, prior to the hearing in chambers for an injunction, and that fact is set up in the answer and proved, it is not error for the chancellor to refuse the injunction, and it is a matter within his discretion, at the final disposition of the bill, to determine the question as to the costs.

Injunction. Municipal corporations. Tax. Costs. Illegality. Before Judge JAMES JOHNSON. Chatham county. At chambers, July 1st, 1874.

S. P. Goodwin and others, citizens of Savannah, filed their bill against the Mayor and Aldermen of the city of Savannah, a municipal corporation, to the May term, 1874, of Chatham superior court, in which they alleged that the said Goodwin, and other complainants named, were engaged in the business of draying, and used in their said business certain drays and vehicles drawn by animal power. That Morel & Mercer were engaged in the business of buying and selling grain and produce. That M. J. Doyle was a grocer; and J. J. Dale & Company were engaged in the lumber business; and that all said complainants' last named used vehicles drawn by animal power in their said several branches of business, as incident and necessary thereto, but not as a distinct and separate occupation.

That the said the Mayor and Aldermen of the city of Savannah, by a certain ordinance passed in council December 31st, 1873, and commonly known as an ordinance to assess and levy taxes and raise revenue for the city of Savannah, for the year 1874, did, among other things, declare, in the third section thereof, that in addition to the *ad valorem* tax upon all real and personal property in the city of Savannah, certain specific taxes should be paid by every person using and employing in his, her or their business, any dray, truck, cart or waggon, cab, hack, buggy, omnibus, break-wagon, or any other vehicle for the transportation of passengers and baggage, or for the transportation of goods, wares and merchandise, to-wit: \$16 00 for each one-horse dray or truck; \$24 00 for each two-horse dray or truck, and so on.

That on February 7th, 1874, said S. P. Goodwin and others filed their bill to the May term, 1874, of Chatham superior court, and prayed for an injunction against the collection or enforcement of said taxes, upon the ground that they were taxes upon the property of complainants, and were

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not *ad valorem* as required by the constitution of Georgia. That the judge of said court did thereupon grant the injunction prayed for; that no effort had been made by said city to dissolve the same, and that said action, and the subsequent course of said defendant had, in effect, fully admitted the unconstitutionality of said taxes.

That on March 24th, 1874, the said defendant did pass another ordinance, entitled an ordinance to amend the ordinance hereinbefore mentioned, and did provide that all that portion of said ordinance which provides specific taxes on drays, wagons, and other vehicles, be repealed and the following substituted therefor: "In addition to the *ad valorem* tax on property already mentioned in said ordinance, the following taxes on business and property shall be levied and collected: Each person engaged in the business of transporting goods, etc., or baggage, or passengers and baggage, or in loading or unloading vessels by horse power (except such persons as are already taxed on said business in said ordinance) shall pay a tax on said business; said tax to be due and paid yearly, and to be graduated according to the number of drays, wagons, etc., used in said business;" that said ordinance then provided a specific tax to be paid by each person using said vehicles, ranging from \$15 00 for one vehicle to \$1,000 00 for not more than fifty vehicles, said tax amounting to from \$15 00 to \$24 00 upon each vehicle used, irrespective of the value of the same.

That said ordinance also required a tax of two and one-quarter per centum *ad valorem* on the value of each animal and vehicle so used; that for each vehicle a badge should also be taken out, at the expense of complainants, and placed in a conspicuous place on each vehicle, which should be conclusive evidence that said tax had been paid; that a failure so to affix said badge to any vehicle should be punished before the police court by fine not exceeding \$10 00, and by not more than ten days in jail, provided said tax had been paid; if not, the fine to be the amount of said specific tax and costs, or not exceeding thirty days in jail.

That by said ordinance a specific tax was already imposed upon the several branches of business of the said complainants Morel & Mercer, M. J. Doyle and J. J. Dale & Company; that a tax of one per centum was levied on furniture, stock in trade, and other species of personal property, and one-fourth of one per centum upon the value of bonds, and other species of personal property specified in said ordinance, while two and one-quarter per centum was levied upon the stock in trade and personal property of complainants. That a tax of one per centum was also levied upon income from business. That the constitution of Georgia required taxation on property to be *ad valorem* only, and uniform upon all species of property taxed.

That said taxes were unconstitutional and onerous, amounting to some six per centum upon the value of complainants' property, and almost prohibitory in their character.

That the returns were required to be made in the early portion of the year, when business was most active, and the largest number of animals and vehicles in use; whereas, in spring and summer, a large proportion of them were unemployed and useless; that said so-called specific tax on business was in no just sense a tax upon occupation, but only an attempt to enforce the original specific tax upon the property of complainants under a change of name; that said taxes were not *ad valorem* or uniform, and that even if said taxes were specific taxes upon the business of complainants, said defendant had no power to graduate said taxes as provided by said amendatory ordinance.

That said defendant was proceeding to enforce the collection of said illegal assessments against all of said complainants; whereupon complainants averred that they were otherwise wholly remediless, and prayed for an injunction.

The defendant, in its answer, filed May 4th, 1874, averred in substance that it admitted that the complainants were engaged in their several branches of business, the passage of the ordinance of December 31st, 1873, the filing of the original bill by S. P. Goodwin and others, and the granting of the

injunction asked; it also admitted the repeal of said ordinance, without any effort on the part of defendant to dissolve said injunction, or to oppose said bill, but protested that it did not thereby admit said repealed ordinance to be illegal.

Defendant also admitted the passage of the amendatory ordinance of March 24th, 1874, but submitted that by the statutes of Georgia it was authorized to impose taxes on those who transact, or offer to transact, business in said city, and that said taxes imposed on complainants by said amendatory ordinance were legal.

That it had, since the filing of said bill, repealed so much of said ordinance as imposed a tax of two and one-quarter per centum on the value of the animals and vehicles used by complainants, and that such portion of said ordinance was no longer in force.

Defendant further submitted that such portions of said bill as referred to the wisdom and expediency of said tax, were matters exclusively for the consideration of the Mayor and Aldermen of Savannah.

After argument, the presiding judge refused to grant the injunction prayed for, and thereupon the complainants excepted.

GEORGE A. MERCER; J. V. RYALS, for plaintiffs in error.

W. S. BASINGER, for defendant.

TRIPPE, Judge.

1. It has been several times held by this court that a tax on occupations, businesses, professions, etc., is not a tax on property, subject to the *ad valorem* and uniformity rule provided in the 27th section of the 1st article of the constitution: 42 *Georgia*, 596; 49 *Ibid.*, 195; 50 *Ibid.*, 530. The Mayor and Aldermen of the city of Savannah are expressly authorized "to make assessments and to lay such taxes on the inhabitants of the city and those who hold taxable prop-

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erty in the same, and those who transact, or offer to transact, business therein, as said corporate authorities may deem expedient for the safety, benefit, convenience and advantage of said city, etc.: Code, section 4847. In the case of *The Home Insurance Company of New York vs. The City Council of Augusta*, 50 Georgia, 530, it was ruled that a tax on fire insurance companies different from that imposed on life insurance companies, is not obnoxious to any constitutional requirement. When the state levies a tax on businesses, professions, etc., it varies the tax from \$10 00 to \$200 00, and has done so every year since the *ad valorem* or uniformity rule was first in any constitution. This being the rule, we cannot see the objection to a tax of \$50 00 on a business which employs ten drays or wagons, and a tax of \$25 00 when five are employed. A tax on sales varies according to the amount of sales, and if the government protects one when selling \$500,000 00 worth, ought not that business to pay more than where only \$20,000'00 or \$50,000 00 worth are sold? Will not twenty drays or wagons, running daily over the streets of a city, cause a greater demand for repairs, and call on the city more for the protection of its ordinances and the authorities thereof, than when five are used? Such a tax should be apportioned according to the extent of such business, and we do not see in it any conflict with the constitution. It is in accord with the spirit of an *ad valorem* and uniform tax.

2. Three of the complainants allege that they are not liable to the tax, as they are not engaged in the business which is taxed. If so, they each can set up that by illegality, and there is no common ground on which they stand in that regard which makes it necessary that equity should interfere by a restraining process. Two may be liable and one may not be. Each case is to be determined by its own facts, and one has no connection with or relation to the other, as to the question whether they are carriers or not. All are jointly interested in the question as to the constitutionality of the tax, provided they are carriers and come within the ordinance. But if they do not—if they are not carriers—then

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it is because of the special facts of each case, and they should not burden a court of equity with a bill to try many cases in one, when all are different, and each is to be determined by its own peculiar facts. Their own allegations take them out of the bill so far as it makes the point of illegality on the tax, and they cannot come in on the ground that the assessors or collectors of the tax have, by mistake, counted them as carriers, when in truth, or at least as they allege, they are not.

3. If the ordinance that might have been and was complained against as illegal, was repealed, there was no necessity for an injunction against it. And when it was repealed it did not affect the legality of a subsequent ordinance. Costs in equity are taxed in the discretion of the chancellor: Code, section 4210.

Judgment affirmed.

DAVID A. VASON, trustee, *et al.*, plaintiffs in error, vs. SARAH A. BELL, administratrix, *et al.*, defendants in error.

(TRIPE, Judge, was providentially prevented from presiding in this case.)

1. A marriage settlement made without fraud, and duly recorded, in which the settler covenants to stand seized to the use of the intended wife and children of the marriage, and two other of his children by a former wife, of a sum of money which he covenants to invest for the uses declared, and for the faithful performance of which he pledges and mortgages his whole estate, then in his possession or thereafter to be acquired, is a good settlement against the husband, and if at the time, perfectly solvent, including the trust then assumed by him as a debt, it is good against creditors present and future. Marriage is a valuable consideration, and the lien thus created on property, in possession of the husband, duly recorded, is notice to all subsequent creditors, as to such property. But as to the property thereafter to be acquired, the lien is upon a mere possibility, and is not good against either present or future creditors.
2. When equity enforces a trust in a marriage settlement, in favor of those coming within the scope of the marriage consideration, it will

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- enforce it in full in favor of all the beneficiaries, whether they be within the scope of the consideration, or be only volunteers.
3. A marriage settlement, however good against the settler and creditors, or even subsequent purchasers, cannot divest legal liens actually acquired, such as judgments and mortgages.
 4. That a guardian is in debt to his wards, as appears by his returns to the ordinary, does not give the wards a lien on his estate, unless the fund can be traced into some specific thing, or can itself be identified; nor does the fact that the guardian's whole estate is before the court, in the hands of a receiver, alter the rule. And this doctrine, that trust money does not create a lien, unless it can be traced, applies to all trusts of money, or of property turned into money. To give the *cestui que trust* a lien, the money must be traceable, or be capable of identification.
 5. A laborer, or mechanic, who, as the employee of another mechanic, works upon a building, and accepts as a discharge of his debt, from his employer, the promissory note of the owner of the building, has no lien as a mechanic upon the building.
 6. Whether one, who makes at the time of his marriage a settlement upon his wife, thereby disables himself from paying his existing debts, is a question of fact, and if the evidence be conflicting, and there be sufficient to justify the finding, this court will not disturb it.
 7. When by consent of parties, the whole of a case, both as to the law and the facts, is submitted to the judge, this court will treat the judgment of the court, as to the facts, as though it were the verdict of a jury.

Equity. Husband and wife. Marriage settlement. Mortgage. Trusts. Judgments. Lien. Guardian and ward. Mechanic's lien. New trial. Before Judge STROZER. Dougherty Superior Court, October Term, 1873.

David A. Vason married Cordelia, a daughter of Henry Pope, by whom he had two children, William I. and Francis C. He, in right of this marriage, received certain negroes and other property, from the estate of Henry Pope. After the death of this wife, he contracted marriage with Mariah I., her sister, and prior to its consummation, to-wit: on the 18th day of June, 1855, he made a marriage settlement, in which he acknowledged himself to stand seized of the negroes that his intended wife was entitled to out of her father's estate; also, of the negroes which he had received in right of his first wife, and also of the sum of \$13,000 00—which he supposed at

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the time to be equal to the other property received, and to be received, in right of both his wives—for the following purposes, uses, trusts and limitations: 1st. That he should have the management of the whole of his property during his life, (unless he should at any time voluntarily relinquish it,) without any account for the hire or profits thereof, except for the support of the said Mariah, the support and education of William I. and Francis C., and of the children to be born of that intended marriage. In case the wife survived David A., the property was then to be equally divided between said Mariah and the children of both marriages, share and share alike. In case of Vason's surviving, the property to be divided among the children equally at his death. The property not to be subject to the debts of said Vason, but to be only in trust, for the purposes specified. The said David A. Vason to have the power at any time to invest the whole or any part of the said \$13,000 00, in such property as he might deem best for the *cestui que trusts*, the title to which should be executed to him as such trustee, and pass under the deed; he to have the right to sell or dispose of any part of the property therein conveyed, or which may be purchased. The proceeds to be invested in such manner as he may think best for the parties interested.

"This instrument further provided that the whole of the estate possessed by said Vason at that time, or which he may thereafter become possessed of, shall" be and was "thereby pledged and mortgaged for the faithful execution of said trust, so that the whole of said sum, to-wit: the sum of \$30,000 00, (negroes \$17,000 00, other property \$13,000 00,) shall not be diminished by any act of said Vason, but that the same shall remain for the uses and purposes as above stated." The settlement was duly recorded.

At this time David A. Vason was possessed of a large tract of land, now in his possession, in Dougherty and Lee counties, the dwelling-house and lots in Albany, where said Vason now lives; town lots of value in Albany, and real estate elsewhere, besides a large number of other negroes than those

mentioned in the marriage settlement, and good debts of great value. He was not in debt, or if in debt at all, none of those debts are now outstanding against him unsatisfied.

The second wife, Mariah L., died in 1869, leaving four children, the fruit of said last marriage, to-wit: Pope A., Callie D., Henry A. and Dolly May. Neither the \$13,000, nor any part of it, has been invested in any property whatever, but the said David A. Vason used it as he did his own property and money in his business. All the negroes of the trust, as well as his individual negroes, were lost by the results of the war, and his estate otherwise greatly reduced.

On the 23d of November, 1870, the said Vason contracted another marriage with Sarah H. Ficklin. To induce Miss Ficklin to enter into marriage with him, said Vason agreed, from the date of the marriage, to stand seized for the uses, trusts and provisions therein named of the following property, to-wit: "the house and lots in Albany," where said Vason then lived, (this property cost about \$10,000 00,) all the "household and kitchen furniture on said premises, or which might thereafter be purchased by him." The said Vason "acknowledged himself bound to pay the sum of \$15,000 00" to himself, as trustee, for the uses after stated, which said sum should stand as a charge and prior lien upon the said Vason's entire estate, until the sum is fully discharged—all in trust that his said intended wife should be maintained, the minor children of said wife should be educated and maintained, and in the case of the death of said Sarah, that he or his representative hold the same, for the uses of such children as may be born of that marriage, and of the minor children of said Vason, then members of his family (the children of his second marriage.) In the event of the death of said David A. Vason, his intended wife him surviving, the said trust to be divided equally between said Sarah and the said objects of the settlement.

The right of sale and investment of said trust property was given to said Vason upon the written consent of said Sarah, or under the decree of a court of equity, the proceeds of sale and

investments to follow uses and trust, as declared. This settlement being agreed on and executed, the marriage was solemnized.

At the date of this settlement, there were a number of judgments against said Vason, which are still open and unsatisfied, besides a great number of other debts not in judgment. Whether his estate was sufficient to pay his debts in addition to meeting the obligations of the above trusts, the evidence was conflicting.

Judgment creditors in the United States and state courts, threatened the seizure and sale of all the property, real and personal, for the satisfaction of their said judgments, and this bill was filed by David A. Vason, as trustee under both settlements, to have the trusts secured for the benefit of his *cestui que trusts*, against said judgment creditors, and all other of his creditors; he made a schedule of his debts, and of his estate, both real and personal, offering to surrender the whole to the satisfaction of the debts, and asking only on his part the protection and security of the trust, out of said estate.

The bill also asked an injunction, which was granted, and the appointment of a receiver to take charge of the property for the benefit of all concerned.

David H. Pope was appointed auditor to audit the several demands against Vason. All the creditors proved their debts except some judgment creditors in United States courts.

The answers of the creditors denied the validity of these trusts—their superiority and priority of payment—and alleged that their debts should have precedence of payment because contracted most generally for the benefit of the trust estate; and as to the trust in favor of William I. and Francis C., they insisted that David A. Vason, their father, had already advanced them out of his estate more than their interest in this trust.

Vason admitted the fact of the advances by him to each of these children, of amounts larger than their respective interest in the money part of this trust, but he denied that it was in payment or extinguishment of their claims in this trust fund,

but as advancements to them out of his individual estate, which he, at the time thereof, could well afford to do without prejudice to the rights of creditors.

1st. The auditor sustained the lien of the settlement of 1855, for \$13,000 00, upon all the property of the estate, as prior to all claims except costs, taxes, and a vendor's lien in favor of John A. Davis.

The lien and general creditors excepted to this branch of the report upon the ground that no property was designated as being covered by said settlement, it being simply an agreement to settle said amount; also, that if a trust, it was not entitled to priority until the death of Vason. Also, that the enforcement of said trust was barred by the statute of limitations. Also, that William I. and Francis C. Vason, the children of the first marriage were volunteers as to said settlement, and therefore said trust would not be enforced as to them.

2d. As next in dignity, the auditor reported in favor of the claim of Marcellus E. Vason, in right of his wife, for \$4,913 71. This indebtedness was based on the return of David A. Vason, as guardian for said wife. It appeared that on April 1st, 1873, he was indebted in that amount, principal and interest, to his said ward, for funds which he had received in the year 1852. It was not shown what had become of this money.

The lien and judgment creditors excepted to this portion of the report upon the ground that the facts as above stated, did not entitle the claimant to a lien.

3d. As next in dignity the auditor allowed judgments in the order of their date, which were prior to the settlement of November 23d, 1870, and then the trust created thereunder to the amount of \$25,000 00.

The creditors postponed by this ruling excepted to it upon the ground that Vason was insolvent at the date of the execution of said instrument, and that therefore no valid trust for the benefit of his wife and children could be created as against existing creditors.

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4th. After allowing certain other liens as next to be paid, the auditor placed a note in favor of William Armitage for \$148 78, dated April 10th, 1871, due December 1st following, amongst the general creditors. A mechanic's lien had been sued out upon this claim, as against the residence of Vason, in the city of Albany, it being alleged that it was for work done as a carpenter upon said house.

It appeared from the evidence that Vason had employed F. M. Thompson to make repairs on his house a short time before his marriage with Miss Ficklin. That Thompson procured Armitage to do the work. That he never paid either Thompson or Armitage. That he gave Armitage the note for his services.

To this portion of the report Armitage excepted.

Many other issues not herein set forth were made upon the auditor's report, but they are unnecessary to an understanding of the decision. All the questions of law and fact were submitted to the determination of the court without the intervention of a jury.

It decreed that the report of the auditor be sustained with the following modifications:

"The exception to the claim of M. E. Vason and wife is sustained as to its priority. The amount allowed is to be paid out of the funds as to the other simple contract creditors."

"The exception to that portion of the auditor's report which allows the claim of David A. Vason, trustee for Mariah I. Vason and children, is sustained, and said claim allowed only as a general creditor."

"The exception to so much of the auditor's report as gives a priority of payment to the claim of David A. Vason, as trustee for Mrs. Sarah H. Vason, and children, is hereby sustained, except as to the house and lot valued at \$10,000 00, the claim to the same being superior to all others whatever, it being an investment of the trust fund; but the remainder of said claim, being a simple charge upon said estate, and having no specific lien upon the fund to be distributed, occupies the position of a general creditor."

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Cross-bills of exception were sued out upon said decree, and error assigned accordingly.

R. F. LYON ; G. J. WRIGHT, for plaintiffs in error.*

HINES & HOBBS; WARREN & ELY; SMITH & JONES, for defendants.

McCAY, Judge.

1. Marriage is a valuable consideration, and a marriage settlement, *bona fide* made, the forms and requirements of law duly complied with, is an instrument that a court of equity will not be slow to enforce. At common law the husband became, upon the marriage, the purchaser of all the wife's property (personal) in possession, and became entitled to reduce into possession any she might be or might become entitled to. He acquired the right to control her person and her labor, and the consideration of marriage has ever been held of the very highest nature: see the case of *Campion vs. Cotton*, 17 Vesey, 263, where the doctrine was carried so far as to sustain an ante-nuptial settlement of *all* the husband's property on the wife to the exclusion of his creditors; nay, it was even held that stocks belonging to other persons, but to which the husband had *apparently the title*, passed under the settlement to the wife as a *bona fide* purchaser for a valuable consideration. Nor does it require that specific property in specie must be settled. The husband may, as he did in the case before us, covenant to settle, and this will create a debt against him which he may charge on his estate as a debt. Such covenant creates a debt provable in bankruptcy, if it, the covenant, be to settle immediately: See *Bright on Husband and Wife*, 134, 161. If this be a debt why should it not be the subject of mortgage duly executed and recorded? Mr. Roper, in *Roper on Husband and Wife*, considers that if a husband covenant to settle on his future wife all the personal

*It is thought unnecessary to give the precise interest which the various counsel represented, as the parties to this litigation were so numerous.

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estate of which he was then possessed, the ownership of the property is changed in equity, and if he sell and invest the proceeds in land, even in his own name, the money so laid out may be followed, for the benefit of the beneficiaries under the marriage settlement, and their interest will be a lien or charge on the land in equity against the heir. The settlement in this case, or the covenant, is very sweeping in the charge it makes on his property. It includes present and future acquired property. As to the future, we see no difficulty. A man may charge or sell all his estate by deed. It is only a question of discretion. A part of his estate would be too uncertain, but all his estate is broad enough and plain enough. It is as good as metes and bounds, since it is just as capable of being made certain as any other description. As to the charge on the future acquisitions, that is unquestionably illegal; one cannot convey or mortgage property not his at the time. "It is common learning in the law that a man cannot give or charge that which he hath not:" *Robison vs. McDonnel*, 5 M. & S., 228. Under our registry laws there might arise difficulties in a contest with purchasers or judgment creditors of lands not in the county of the registry. But there is no such question here, and if there were we are not prepared to say that the registry of the marriage settlement, according to the act of 1847, would not be good notice even as to lands out of the county. We are clear, therefore, that upon all the property owned by Mr. Vason at the time of this first marriage settlement, then free from other liens, this deed created a debt to his wife and to the children of the marriage, secured by mortgage on his then property, and that, as against subsequent creditors, as it was duly recorded, it has a preference. We are clear, too, that this enures not only to the children of the contemplated marriage but to the children of the first marriage included in the deed. As against creditors, we do not see why it would not be good as a gift to these children. The consideration of natural love would support it, and the record of the mortgage would be notice.

2. But as we hold that the marriage settlement can be enforced as to those within the scope of the marriage consideration, these children of the first marriage come within the well settled rule, that when equity enforces a marriage contract, it will enforce it in favor of all included in it whether they are within the scope of the marriage consideration or not. And this, on the very simple ground that it was not the intent to give all to those within the scope; that the agreement is entire and would perhaps not have been made at all except as it is.

3. Even a marriage settlement cannot divest legal liens; cannot convey title not belonging to the husband. The most that can be claimed for the beneficiaries, is that they stand in the relation of purchasers for value. And even a purchaser for value takes subject to legal liens, such as judgments duly recorded, mortgages, etc.

4. To follow trust funds, it must be possible to identify them, to show that they have gone into the property sought to be subjected. We have diligently sought to find a case to justify the position of the counsel for these minors, but we do not think such a case can be found. The case put, of a deposit in a bank by a trustee, of money, to his own account, turned on the power of identification; the court held that, under the facts, it was possible to show exactly what money was in the bank, since each check appropriated the money first put in and so on. The statute of distributions is confined to the case of the death of the trustee. Our law makes, in such a case, a special rule for debts due as trustee. But it makes various other specific preferences, and we see no authority in the courts to extend the rule to other cases—as insolvency, etc. That is for the legislature and not the courts.

5. We see no reason to hold that a laborer who takes a promissory note of a third person in *discharge* of his debt, stands on a different footing from other persons agreeing to take the note of a third person in *discharge*. That is the clear law, and is just as applicable to laborers as to other

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people. He holds no debt against Vason: See Addison on Contracts, 1098 and 1099.

6. We do not go into the question of whether this first or second settlement was a fraud upon the creditors of Mr. Vason. The court has found that it was not, and there is plenty of evidence to sustain that finding.

7. The parties having waived a jury and consented that the judge might act as a jury and find the facts, his decision stands before us as a verdict and we do not feel authorized to disturb it. We, however, reverse his judgment on the questions of law indicated in the head-notes to this opinion, with directions as to the disposition of the case.

Judgment reversed.

JAMES N. B. COBB, plaintiff in error, *vs.* THE MAYOR AND COUNCIL OF THE CITY OF DALTON, defendant in error.

The Mayor and Council of the city of Dalton have the same power, under the charter of the city, to assess a fine for neglect to work on the streets, which the law vested in the commissioners of roads of a county to impose for failure to work the public roads; and under the second section of the act of December 15th, 1859, the city authorities had power to enforce the payment of such fine by imprisonment under the limitations in said act contained.

Municipal corporations. Streets. Roads. Fines. Before Judge McCUTCHEM. Whitfield Superior Court. April Term, 1874.

James N. B. Cook brought case against the Mayor and Council of the city of Dalton for \$10,000 00 damages, alleged to have been sustained by him on account of the illegal arrest and imprisonment of his son, John V. Cobb, a minor. The defendant pleaded the general issue, and justified upon the ground that the arrest of said minor was legal, it being for his failure to pay a fine properly imposed upon him.

The evidence is unnecessary to an understanding of the

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decision. The jury found for the defendant. The plaintiff moved for a new trial upon the following, among other grounds:

1st. Because the court erred in charging the jury as follows: "If the evidence shows that plaintiff's son, John, was notified to work on the streets of the city of Dalton, and that he refused or neglected so to do, and that after being summoned to answer for such default he was fined by the mayor and council therefor, and if a notice or rule *nisi* was served upon him requiring him to show cause why he should not be punished for his refusal or neglect to work or to pay the fine imposed for that default, and if the evidence further shows that the mayor and council, on the hearing of said rule, whether John Cobb appeared as required by said rule or not, committed him to the guard-house for his default aforesaid, such imprisonment would not authorize the plaintiff to recover in this case."

2d. Because the court erred in charging as follows: "The mayor and council had jurisdiction to enforce obedience to the by-laws of the city, and to enforce the payment of fines imposed under authority of the charter and by-laws of the city by imprisonment, and when such jurisdiction exists, a judicial officer, in the absence of bad faith, would not be liable to damages for a judicial act on account of simple irregularity alone. If such bad faith were shown to exist, while it would or might make the officer guilty of the bad faith personally liable, would not make the corporation liable."

The motion was overruled, and the plaintiff excepted.

J. A. GLENN; HANKS & BIVINGS, for plaintiff in error.

SHUMATE & WILLIAMSON; C. E. BROYLES, for defendant.

TRIPPE, Judge.

Under the charter of the city of Dalton, the mayor and council have the same power to assess a fine for neglect to work on the streets, which the law vested in the commission-

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ers of roads of a county to impose for failure to work the public roads of the county: See Cobb's Digest, 948, and Code, section 619, as to the power of the county authorities. The act of 1865 and 1866, which is contained in said section, grants power to the commissioners of a county to imprison defaulters. The second section of the act of December 15, 1859, pamphlet, page 151, confers the power on the mayor and council to enforce the payment of all fines imposed, by imprisonment not exceeding thirty days. In this case, the party fined and imprisoned was a defaulter for not working the streets. He failed and refused to pay the fine. The penalty provided in the ordinance of the city was then imposed upon him to-wit: imprisonment. If there was irregularity in some of the proceedings, that did not create a liability on the part of the city for damages: See Dillon on Corporations, section 752, *et seq.*; 19 *Georgia*, 97; 20 *Ibid.*, 635 and 845.

Judgment affirmed.

PRIMUS EDWARDS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

[TRIPPE, Judge, was providentially prevented from presiding in this case.]

1. When, on a trial of an indictment for murder, it appeared that hot words had passed between the parties, and the deceased had drawn his knife from his pocket, but had not opened it, or made any offer to use it, and he was stabbed and killed by the prisoner, as he, the deceased was being taken out of the room by persons present, and the judge, after fully charging the jury as to heat of passion, malice, express and implied, and as to murder and manslaughter, as laid down in the Code, further charged that to reduce a crime from murder to manslaughter, something more was necessary than provocation by words, threats, menaces, or contemptuous gestures, and that such words, accompanied with drawing a knife, with no attempt to use it, was not sufficient: *Held*, that under the facts of this case such charge was not error.
2. Where, on a trial for murder, the judge charged the jury as laid down in section 4325 of the Code, "in all cases of voluntary manslaughter, there must be some actual assault upon the person killing, or an at-

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tempt by the person killed to commit a serious personal injury upon the person killing, or other equivalent circumstances to justify the excitement of passion and exclude all idea of deliberation or malice, express or implied," and then added that the "equivalent circumstances," whatever they are, must correspond somewhat in their character with an actual assault, or an attempt to commit a serious personal injury :

Held, that whilst this court is not prepared to adopt this restriction of the "equivalent circumstances" mentioned in the Code, yet, as there was nothing in the evidence in this case but words, threats and menaces, which are, by the same section of the Code, declared not to be within the meaning of equivalent circumstances, we do not feel authorized to reverse the judgment refusing a new trial.

3. The evidence in this case justifies the verdict.
4. It is not a ground of new trial that the names of one or more of the jurors who tried the case are not on the jury list. (R.)
5. The opinion of this court is *Brown vs. The State*, as to the meaning of the statute making the jury judges of the law and the facts, and in all criminal cases to find a general verdict of guilty or not guilty, is affirmed.

Criminal law. Manslaughter. New trial. Jury. Before Judge CLARK. Sumter Superior Court, April Term, 1874

Primus Edwards was placed on trial for the offense of murder alleged to have been committed upon the person of Berry Adams, on March 31st, 1874. The defendant pleaded not guilty.

The evidence made this case : The defendant and the deceased were laborers upon the same plantation. The defendant lived at the house of one Bunk Lamar. The deceased resided in his own house with his wife, about twenty yards distant. The defendant had been somewhat attentive to the wife of the deceased, which had produced a feeling of jealousy upon the part of the latter. On the day of the felony the deceased was at the house of Bunk Lamar when the defendant came home to dinner. They became involved in an altercation in reference to the relations existing between the wife of deceased and the defendant. Some mutual abuse passed. The defendant had his knife open in his hand. The deceased pulled his knife out, but before he opened it, Bunk

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Lamar interfered, and he returned it to his pocket. As Bunk Lamar was carrying him out of the house, the defendant stabbed the deceased in the back, from which wound he died in about fifteen minutes.

The jury found the defendant guilty. A motion was made for a new trial upon the following, amongst other grounds:

1st. Because the court erred in charging the jury as follows: "If the provocation was words, such as the damned liar, or damned rascal, or damned son-of-a-bitch, accompanied with the drawing of a knife, but with no attempt to use it, such provocation is not sufficient to justify the excitement of passion, and to exclude all idea of deliberation or malice either express or implied. If these constitute the sole provocation, malice will be implied."

2d. Because the court erred in charging the jury as follows: "The sudden heat of passion, which is supposed to enter into every case of voluntary manslaughter, must originate and spring from some actual assault upon the person killing, or some attempt by the person killed, to commit a serious personal injury on the person killing, or other equivalent circumstances. The equivalent circumstances, whatever they are, must correspond somewhat in their character with an actual assault, or an attempt to commit a serious personal injury."

3d. Because the court refused to charge as follows: "The jury are the judges of the law and the facts, and while they are to look to the court for the law, at the same time, if they conscientiously differ with the judge as to what is the law, they may find according to their own judgment."

4th. Because the verdict was contrary to the law and the evidence.

The entire charge of the court is embraced in the bill of exceptions. It covered the offenses of murder and manslaughter and defined malice, express and implied.

The motion was overruled and the defendant excepted.

FORT & McCLESKEY ; JACK BROWN, by J. A. ANSLEY,
for plaintiff in error.

C. F. CRISP, solicitor general, by brief, for the state.

McCAY, Judge.

1. We do not feel authorized to disturb this verdict. There is much in the evidence to show express malice. The Code, section 4325, in express words, declares that "provocation by words, threats, menaces, or contemptuous gestures, shall, in no case, be sufficient to free the person killing from the crime of murder," and there is absolutely nothing in this case more than these things. That the deceased pulled out his knife, but made no effort to use it, and did not even open it, can, in no sense, be more than a menace, if it was that. From the evidence it is fairly inferable that the prisoner pulled out his knife first, and it is clear that when the killing took place the deceased had put up his knife and was leaving the room, so that the prisoner had to *follow* him and to reach round the witness to get at him. Under the evidence, even with the most liberal construction of the Code, this is murder, since there is nothing in the circumstances to justify the heat of passion that is not expressly declared by the Code to be insufficient to reduce the killing to voluntary manslaughter.

2. We are not prepared to say that we entirely approve of the definition given by the court of "equivalent circumstances," although we see a good deal of force in the argument to show that he has given the true meaning. It is a general rule of construction that when special things are mentioned, and then a general clause, the general clause is to be taken in the sense put by the judge.

3. But however this may be, there is nothing in the evidence in this case to suggest any equivalent circumstances. It is perfectly plain that "equivalent circumstances" does not include words, threats, menaces or contemptuous gestures, since the Code, in terms, so says. And there is nothing else

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here, even if the deceased was in the wrong in the use of even threats, etc., which is not at all clear. The prisoner's declaration that he would do with deceased's wife as he pleased, would justify a very high degree of passion on deceased's part, and fairly excuse a very strong reply, and perhaps much more. So that even if the idea of Judge CLARK as to the meaning of equivalent circumstances, be wrong, this does not justify a new trial. This court does not sit here to decide abstract questions or to grant new trials because the judge has said or done something that is not right in the abstract. The error, to be the ground of a new trial, must be some infringement of the rights of the prisoner, and not a mere abstract error.

4. We decided in 40 *Georgia*, 253, that it is not a good ground for a new trial, that one or more of the jurors who tried the case are not on the jury list. It is *propter defectum*. The prisoner has not only the fullest opportunity to object for cause when the juror is put upon him, but has a large number of peremptory challenges, and it is not only a fair presumption, but is in most cases true, that the jury is made up of men which the prisoner is satisfied with, and it is not a hardship to deny him, after verdict, the right to go to the jury list and find objections to the jurors who tried him. That list was just as accessible before as after the trial, and it would open the door to much abuse to allow of the practice insisted on.

5. Upon the other question made in this record, we have passed several times. The court below was asked to charge the jury that they were to take the law from the court, but if they conscientiously differed from the court as to what the law was, they had a right to do so. This extraordinary request is based on that section of the Code which declares, "that on every trial of a crime or offense contained in this Code, or for any crime or offense, the jury shall be judges of the law and the fact, and shall in every case give a general verdict of guilty or not guilty, and on the acquittal of the defendant no new trial shall on any account be granted by the court." Code,

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section 4646. This court has held in *Brown vs. The State*, 40 Georgia, that this right of the jury to judge of the law and the facts, does not authorize them to get the law except through the court. There must be some channel through which the jury are to get the law. It is their duty, their necessary duty, to find out what the law is, and to come to a conclusion upon the matter, just as it is their duty to find out what the facts are. They have to judge of both to come to a conclusion as to both. We have held, and still hold, that the judge is the channel through which they are to get the law, just as the evidence "introduced" is the channel through which they are to get the facts. They have no right to go out of the evidence for the facts, nor to go away from the judge for the law. From these two sources they are to get the material for their verdict, and they are thus judges of the law and facts, and must find a general verdict, including law and fact. Judgment affirmed.

THE COLUMBUS IRON WORKS COMPANY, plaintiff in error,
vs. JOHN LOUDON, assignee, defendant in error.

1. The lien given by section 1966, Revised Code, to machinists on machinery furnished or put up by them, cannot be enforced by summary proceedings as in cases of liens against steamboats, but the same must be prosecuted as is provided for the enforcement of mechanics' liens.
2. The execution that may be sued out in such summary proceedings, may be set aside at a regular term of the proper court, on motion of the defendant, without filing an affidavit contesting the amount or justice of the claim, or the existence of the lien, as is required in certain cases by section 1990, Revised Code.

Machinist's lien. Practice in the Superior Court. Before Judge JAMES JOHNSON. Muscogee Superior Court. November Term, 1873.

Loudon, as assignee of the Empire Cotton Seed Huller and Oil Company, moved to quash an execution against said

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company in favor of the Columbus Iron Works Company, based upon the foreclosure of a machinist's lien. This foreclosure was in the manner of foreclosing liens against steamboats. The plaintiff moved to dismiss such motion upon the ground that the defendant had filed no affidavit contesting the amount or justice of the claim, or the existence of the lien. The court overruled the last motion and sustained the first. To both of which rulings the plaintiff excepted.

PEABODY & BRANNON, for plaintiff in error.

R. J. MOSES, for defendant.

TRIPPE, Judge.

1. This was a proceeding to enforce a machinist's lien arising under a contract made in 1871, and a motion to quash the execution thereon because it had been summarily issued on a foreclosure in the manner of foreclosing liens against steamboats. The right given to machinists to enforce their liens under the act of 1853 and 1854, pamphlet, pages 45 and 46, and as contained in section 1966, Irwin's Revised Code, is governed by the same rules as those which applied to mechanics. Sections 1963 and 1964, Revised Code, require an action on the claim in cases of mechanics, with regular proceedings to verdict, judgment, etc. The facts in this case do not bring it within the new provisions allowing mechanics in certain cases to use summary proceedings, and those provisions cannot cover it. There was no error in the judgment of the court below on this point: See 27 *Georgia*, 576; 32 *Ibid.*, 515.

2. The further objection was set up that the motion was not properly made; that there should have been an affidavit, as set forth in section 1970, Revised Code. No point is made on the fact that the motion was in the name of the assignee in bankruptcy. It is conceded that he stood, for the purposes of this motion, in the place of the debtor. If so, then as that debtor was entitled to the motion before his adjudica-

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tion as a bankrupt, his assignee can move afterwards. Section 1970 requires the affidavit to be filed in cases where the *amount* or *justice* of the claim or the *existence* of the lien is contested. Here neither one of these issues is made. The motion is simply to quash an execution because it was illegally issued upon proceedings which show that fact. If an ordinary execution issue without a verdict or judgment, or variant from them, and it so appears from the record, a motion to quash may be made. If the execution is being enforced by a levy, the defendant may be compelled, in order to stop its collection, to arrest it with an affidavit or by injunction. But if the defendant, at a term of the proper court, with notice to the proper parties, has a legal ground to quash the execution for illegality appearing on the face of it or in the record, he can avail himself of that ground by way of motion. Nor do I say that this right is limited to those cases where there is an illegality thus apparent. There may be cases in which such right exists, and which would have to be shown by *aliunde* proof. That point, however, does not arise in this case.

Judgment affirmed.

T. J. DUNBAR & COMPANY, plaintiffs in error, vs. REBECCA J. MIZE, defendant in error.

(TRIPPE, Judge, was providentially prevented from presiding in this case.)

1. Section 1788 of the Code, which declares "that while the wife may contract, she cannot bind her separate estate, by any contract of suretyship, nor by any assumption of the debts of her husband; and any sale of her separate estate made to a creditor of her husband in extinguishment of his debt, shall be absolutely void," applies not only to a separate estate of the wife created by deed, but to any property held by her as "separate estate" under the act of 1866, or constitution of 1868, and under this rule a mortgage made by the wife to secure a debt of her husband is void.
2. Where a married woman gave a mortgage upon her separate estate to secure a note made by her husband, and the mortgage recited that the

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debt for which the note was given was contracted for the benefit of the wife and family :

Held, that the wife was not estopped by this recital from showing that the same was untrue, and that the debt was wholly her husband's debt.

Husband and wife. Mortgage. Estoppel. Before Judge CLARK. Sumter Superior Court. April Term, 1874.

On January 15th, 1868, William Mize and his wife, Rebecca J. Mize, executed to T. J. Dunbar & Company, a mortgage upon a lot of land in Sumter county, to secure the payment of a promissory note made by said William Mize, on or about December 31st, 1867, due one day after date, payable to T. J. Dunbar & Company, for \$809 65. The mortgage recites that the note was given in payment for merchandize which went to the use of Mize and wife. Proceedings having been instituted to foreclose said instrument as against Rebecca J. Mize, she showed for cause substantially as follows :

The aforesaid note is the individual obligation of William Mize, the late husband of defendant. She derived no personal benefit from the consideration which moved her said husband to sign the same. She was in no way connected with the transaction out of which the note grew. The execution of the mortgage by her was an effort to become security for her said husband by giving the plaintiffs a lien on her separate estate.

The plaintiffs demurred to said answer. The demurrer was overruled and plaintiffs excepted.

The evidence sustained the answer, except there was no testimony as to how the land specified in the mortgage became the property of defendant.

The court charged the jury that if the mortgage was given to secure the payment of a debt due from William Mize, and Rebecca J. Mize was not at all interested in the consideration, the same was void, and they ought not to find for the plaintiffs.

The plaintiffs requested the court to charge that the defendant was estopped from denying the recitals in the mort-

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gage as to the consideration of the note. The court refused so to charge. To which charge and refusal to charge the plaintiffs excepted. The jury found for the defendant.

Error is assigned upon each of the aforesaid grounds of exception.

W. A. HAWKINS, by J. A. ANSLEY, for plaintiffs in error.

GUERRY & SON, for defendant.

McCAY, Judge.

1. Section 1783, of our Code, is as follows: "The wife is a *feme sole* as to her separate estate unless controlled by the settlement. Every restriction upon her power in it must be complied with; but while the wife may contract she cannot bind her separate estate by any contract of suretyship, nor by any assumption of the debts of her husband, and any sale of her separate estate made to a creditor of her husband in extinguishment of his debts, shall be absolutely void." It is contended that this only applies to separate estates created by "settlement," and not to the "separate estate" which the wife, by the act of 1866, and by the constitution of 1868, retains in all her property at the marriage, or which she may acquire by gift, purchase or inheritance afterwards. But we do not think this a fair construction of this section of the Code. Evidently its intent is to afford a personal protection to the wife in any "separate estate" she may have, against the supposed influence of her husband. As to cases where the settlement controls her, such a clause is unnecessary, since, by the first part of the section, as well as by the old law, her powers must necessarily be limited by that. The latter part of the section can only refer to cases where she has a separate estate, and is not controlled or restricted, either by the deed or by the law, in the disposition of it, and we see no reason in the language of this latter clause, and much less in the plain intent of it, to limit its operation to such separate estate as she may have by "deed" specially defining it as "separate estate."

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By our act of 1866, and by the constitution of 1868, all property of the wife which she may have at the marriage, or which she may afterwards acquire, is, in terms, declared "separate estate" in her, and as to such property, the very terms of this section declare that she shall not bind it by any contract of suretyship, or by any assumption of her husband's debts, etc. The words of the section are not "separate estate created by deed," or "such separate estate," but "separate estate" simply. By the general rule of law all conveyances of an estate in fee, gave to the grantee a right to dispose of it at pleasure, and any condition inconsistent with this unlimited power of disposal, was void. But in the case of married women, as to their "legal estates," they could not be disposed of at all, except by a fine, which was a kind of judgment, and was transacted of record. By our act of 1767, a less cumbrous method was provided, but even by this act great precautions are taken to see to it that the wife acts freely and independently of the husband. In equity, where, under the doctrine of trusts, separate estates grew up in England, the rule of law that a full title to an estate could not be burdened with a condition limiting the power of disposition, was, in this special case, not attended to, and for the plain reason that a separate estate in which the wife was not protected from the influence of the husband, was of very doubtful benefit to her. Still, if men saw fit to settle the property upon married women, and did not use in the deed this power of restraint, the chancery courts took it for granted that the donor intended to risk the husband's influence, and permitted the wife to deal with it, even as to him, without restraint. But this section of our Code slips in and limits the right of the wife, even when by the settlement she is unrestrained, and declares that she shall not enter into a contract of suretyship, or bind her estate for her husband's debts, or sell it to pay them. It puts her under disability to do this thing, and declares the act void if it shall be done. *Mrs. Valentino's* case in 41 *Georgia Reports*, 143, does not touch the question we are now discussing. There, the contract of *Mrs. Valen-*

tino was made in 1860, before the Code, and the question was, whether, under the act of 1851, her earnings during the separation between her and her husband, stood upon the same footing as though they had come to her by a deed restricting her rights. I did not agree to this decision, but it turned on wholly a different question from that involved here.

2. We think, too, the court was right in refusing to sustain the objection to Mrs. Mize's defense on the ground that she was estopped by the recitals in the deed. Ordinarily, this is, without doubt, the rule. But the wife, as to such a recital, is under duress. It is the same thing as though you were to insist that an infant was bound because his deed recited that he was of full age. If it had appeared that this recital misled the mortgagees, and that they acted to their hurt on the faith of it, there might be some ground for an estoppel in *pais*, as a woman, even a married one, cannot commit a fraud with impunity. But there was no pretence, here of an estoppel in *pais*; the mortgagees knew as much and perhaps more about the debt than Mrs. Mize did, and in no event are they any worse off. They still have their note on Mize. The mortgage did not hurt that. If there be an estoppel it is an estoppel by deed, and to set up an estoppel in such a case against one under disability would be to defeat the whole purpose of the statute. The protection afforded by the statute would be a farce if it could be evaded by a recital. The same influence that procured the deed could as easily produce the recital, and would not stop to do it. The case of *Finney vs. Sanford*, 41 Georgia, 301, was a case of estoppel in *pais*. The plaintiff had acted on the statement of the wife, he had given up a debt of his own on a third person for the note of the husband, on the faith of the statement of the wife that the husband's debt was contracted for the use of the estate of the wife. Upon a clear inspection of that case it will be found also that the majority of the court merely held that the recital, as well as the sayings of Mrs. Sanford, were evidence, not that they estopped her.

Judgment affirmed.

Flannegan, Abell & Company *et al.* vs. Hardeman & Sparks *et al.*

FLANNEGAN, ABELL & COMPANY *et al.*, plaintiffs in error,
vs. HARDEMAN & SPARKS *et al.*, defendants in error.

Application was made by the creditors against their debtor for the appointment of a receiver, and for an injunction against a third person, who was also a party defendant, to restrain him from disposing of certain cotton alleged to be fraudulently in his possession. A receiver was appointed, but the injunction was refused. Subsequently other creditors applied to be made parties complainants by amendment, alleging additional grounds for the injunction and making certain warehousemen defendants, in whose possession a portion of the cotton was charged to be, as bailees for the original defendant, and asking for the injunction against the warehousemen. The chancellor refused this injunction also, and certified in the bill of exceptions that the receiver was appointed without opposition and by consent of parties, and on the further agreement that no injunction should issue as to the cotton, and that he held that the other creditors who became parties to the proceedings were bound by this agreement :

Held, that there was no error in the refusal of the injunction—the more especially as there is no charge of the insolvency either of the bailees or claimant of the cotton, and no reason shown why a decree against the claimant, which may be had in this case, would not be available to complainants.

Equity. Injunction. Debtor and creditor. Receiver.
Parties. Before Judge HILL. Twiggs county. At Chambers. July 25th, 1874.

Flannegan, Abell & Company, for themselves and other creditors that might become parties thereto, filed their bill against Vickers & Hughes and Benjamin H. Hill, alleging, in brief, as follows :

Vickers & Hughes were planters on a large scale, owning and controlling several plantations, both as partners and as individuals. For the purpose of carrying on such business they procured large advances from complainants, upon which there now remains due a net balance of \$15,397 16. Said defendants agreed, in consideration of such advances, to ship to complainants, who were factors and commission merchants, their entire crop of cotton made in the year 1873. This they have failed to do. They have become insolvent, have fraud-

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ulently combined with Benjamin H. Hill to prevent their assets being disposed of for the benefit of their creditors, and have, in pursuance of such preconcerted plan, turned over to said Hill six hundred bales of cotton of the crop of 1873. Pray the writ of injunction and the appointment of a receiver.

Without argument, and by consent of the counsel for the respective parties then before the court, on December 23d, 1873, the writ of injunction was ordered to issue against the disposition of any property of Vickers & Hughes, whether individual or partnership, and a receiver was appointed to take charge of the same. As a part of this agreement between counsel, the injunction and the appointment of a receiver were both refused as to the six hundred bales of cotton alleged to have been transferred to Benjamin H. Hill.

Subsequently other creditors of Vickers & Hughes became parties to said bill by amendment. They alleged additional grounds why said Hill should be enjoined as to the disposition of the cotton which had passed into his hands; charged that a portion of said cotton was then in the hands of Hardeman & Sparks, warehousemen; made said Hardeman & Sparks, and others not material to be here set forth, parties defendant, and prayed that said Hill be enjoined from selling the cotton turned over to him as aforesaid; that he be directed to turn over the same, or its proceeds, or whatever it may have been invested in, to the receiver; and that Hardeman & Sparks be directed to turn over to said receiver the cotton in their hands or its proceeds.

There was no charge of insolvency made either against Benjamin H. Hill or Hardeman & Sparks. Voluminous answers and affidavits were read upon the hearing, unnecessary to be set forth.

The chancellor refused the orders prayed for, holding that the new parties were bound by the agreement entered into by their predecessors under which the injunction, as to the disposition of the property of Vickers & Hughes issued, and the receiver was appointed; that so long as they pressed their

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claims under this bill, they were bound by what had been heretofore done in the process of the litigation.

To this decision complainants excepted.

R. F. LYON; LANIER & ANDERSON, for plaintiffs in error.

B. H. HILL & SONS, for defendants.

TRIPPE, Judge.

The majority of this court was inclined to put the affirmance of the judgment of the chancellor on the ground upon which he rested it. For myself the fact that there was no charge made in the bill showing that the defendants, Hill or Hardeman & Sparks, were insolvent or unable to respond for the eighteen bales of cotton, or to any decree that might be obtained against them, when taken in connection with the reason assigned by the judge for his refusal to appoint a receiver, etc., makes a pretty clear case for affirming the judgment: See sections 274 and 3098, Code.

Judgment affirmed.

WILLIAM T. SUTHERLIN, plaintiff in error, *vs.* THE UNDERWRITERS' AGENCY, defendant in error.

1. An attachment bond is, under section 3316 of the Code, amendable on motion, and where the obligee's name was by mistake omitted, but it appeared that it was the intent of the signers of the contract to give a bond payable to the defendant in attachment, it was competent to insert the names in the blank left in the bond for this purpose, and this is especially so when the plaintiff in attachment offered to give new and good security to the bond as amended.
2. When four insurance companies, by a common agent and under a common name, to-wit: "The Underwriters' Agency," entered into an insurance contract by a written instrument, which referred to a certain open policy issued by them to their common agent, for the terms of the insurance, and such open policy stipulated that each company received its share of the common premium separately, and was each liable separately for its one-fourth of any loss, in the same manner as though each had issued a policy separately:

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Held, that as they had contracted with the plaintiff by a common name, and by a common agent, that a joint action lay against them for any loss under the contract, and that the jury might so mould their verdict, under the provisions of the Code, as to conform to the contract, by finding one-fourth of the loss against each separately.

3. Where an attachment was proceeding, and a declaration had been filed, and the defendant had appeared and pleaded, but there was no replevy, and the court dismissed the attachment for a defect in the bond :

Held, that this was such a judgment as might be excepted to and brought for review to this court, although the suit might, as a personal suit, be still pending in the court below.

4. When a suit was pending against four defendants, and the court dismissed the suit on demurrer, for a misjoinder apparent, as was alleged, on the face of the proceedings, but permitted the plaintiff to amend his declaration, striking out three of the defendants and thus retain the suit against one defendant :

Held, that the judgment dismissing the suit might be excepted to and brought for review to this court notwithstanding the amendment, and notwithstanding the amended declaration had not yet gone to a final judgment.

5. When notice is given to produce a paper, and the party notified fails to respond, but it appears affirmatively that such paper is lost, and is not, therefore, in the custody of the party notified, his failure to respond personally to the notice and purge himself of any custody of the paper, does not authorize a judgment against him by default as provided in section 3510 of the Code.

Attachment. Amendment. Insurance. Pleadings. Joint and several liabilities. Bill of exceptions. Practice in the Supreme Court. Production of papers. Practice in the Superior Court. Before Judge KIDDOO. Dougherty Superior Court. April Adjourned Term, 1874.

This is the second time this case has been before the Supreme Court : See *46th Georgia Reports*, 652. Only such additional facts are here stated as are necessary to an understanding of the opinion.

The parties having announced ready, the plaintiff called upon defendant's counsel to produce the original open policy number seven hundred and eighty, issued by defendant to Y. G. Rust, under the notice served upon them.

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Mr. Davis, one of defendant's counsel, testified that such paper was used on a former trial, but he had not seen it since; that it was not in his possession, power or control, and that he knew not where it was.

Mr. Vason, of counsel for defendant, testified that he delivered the paper to Mr. Raine, then an agent of the defendant, to be copied, so as to have it embodied in a brief of evidence to be used by defendant on a motion for a new trial; that the original, when in his possession and when used on the former trial, had, before that time, been mutilated and the officers' names torn off; that he did not know where it was, and that it was not in his power, possession, custody or control.

Mr. Raine testified substantially as did Mr. Vason, with the additional statement that it was his recollection that he had returned the paper to the latter.

Defendant's counsel proposed to allow the plaintiff to use a copy of the mutilated original without objection on their part; also to admit the contract of insurance as sued on.

Plaintiff moved for a judgment by default on account of the failure of defendant to respond to such notice. The motion was overruled and plaintiff excepted.

The defendant moved to dismiss the attachment proceedings because the bond was defective.

The facts upon which this motion was based were as follows: The affidavit set out the names of the insurance companies composing defendant in full; the place for the name of the obligee of the bond was left blank, but the defendant was, in other portions of said instrument, referred to as "said fire insurance companies," and as "said insurance companies."

The motion was sustained and plaintiff excepted.

Plaintiff proposed to amend the bond by inserting the name of defendant therein, and by giving new and additional security. This the court refused to permit and plaintiff excepted.

The defendant moved to dismiss the plaintiff's declaration because a joint suit against the insurance companies compos-

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ing the defendant could not be maintained under policy seven hundred and eighty. The copy of this policy attached to said declaration contained the following provision :

"It is further understood and agreed by and between the parties hereto, that nothing herein contained, shall be construed as creating or imparting any joint liability on the part of the above named companies or either of them, but that such companies shall be regarded as only severally liable upon this policy for the amount insured by each under the same, in the same manner, and not otherwise, as if each had issued its separate policy for the proportionate amount which each insures as above mentioned; and if any additional amount shall be indorsed upon this policy, it is to be with the understanding that the said companies each become insurers for one-fourth only of each additional amount."

It also appeared from said policy that each of said companies received its share of the common premium separately.

The court sustained the motion and plaintiff excepted.

The plaintiff proposed to amend his declaration by charging each of the companies composing the defendant with one-fourth of the loss, and by asking that the verdict and judgment be moulded accordingly. This the court refused to permit and plaintiff excepted.

The court stated that it would allow the plaintiff to proceed against one of the companies and dismiss as to the others. The suit was accordingly dismissed as to all of said companies except the Germania. To this ruling the plaintiff excepted.

Error is assigned upon each of the aforesaid grounds of exception.

When the case was called in this court, a motion was made to dismiss the writ of error upon the ground that the rulings excepted to were not final, as the case was still pending in the court below. It appeared that the attachment had been levied by service of process of garnishment, which had not been dissolved. The court heard argument of the case reserving its decision upon the motion. The motion was overruled at

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the time the judgment in the case was pronounced, as will be found by reference to head-notes three and four.

WILLIAM E. SMITH, by R. F. LYON, for plaintiff in error.

VASON & DAVIS, for defendant.

McCAY, Judge.

1. Under the express words of the Code, section 3316, an attachment bond is amendable. The defect in the bond in this case was plainly a mere mistake—a clerical error. In the very nature of things, it is manifest that it was the purpose of the signers of it to make it payable to the defendant. They made and delivered it to the officer with that intent. To fill up the blank is not to alter in the least the contract actually made, and we do not think the security could take any advantage of the act, as it would, in fact, be, after it is amended, the very contract he intended by his signature to make. In substance, this right of the surety is denied in *Hanson vs. Crawley*, 51 Georgia, 529, as the court there held that a memorandum declaring the note payable in gold would bind the security, though it was added after his signature, and without his knowledge, if it were, in fact, true that such was the original contract. But as new security was in this case tendered, we think the right to amend was the stronger. No harm could come. The law is substantially complied with, which is all that is required, as section 6 of the Code declares.

2. Did this case stand only on the open policy, it is not so clear to us that a joint action would lie; but it must be remembered that the plaintiff's right stands not only on this, but on his receipt. That is in the name of the "Underwriters' Agency," and is signed by Rust, as the agent, not of each company, but of all. Taking both these papers together, the contract is a joint contract, though, by its terms, each is only liable to pay his share. It is like a partnership with a firm name, which might contract by its name, and yet

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stipulate in terms the liability of each partner. In England, there might be difficulty in enforcing such a contract at law, for want of a power in the jury to find anything but a general verdict. But under our law the jury has such a right, and no such difficulty exists. Taking both these papers together, we think the contract is clearly a joint one, however precisely it may fix the liability of each for its own share, and we do not doubt that such was the intent of the companies. We have seen a fire policy of these same companies where there was no such open policy, but the insured's name was in the policy itself, and though the same general stipulation as to separate liability was there, as here, yet there was another provision to the effect that if there should be necessity for a resort to judicial proceedings, one joint suit against all, or even a suit against one, should settle the matter.

3. As to the motion to dismiss the bill of exceptions because neither of the errors complained of were in a *final* judgment, we say, as to the attachment the order dismissing it was final as to the plaintiff's rights. He lost by the judgment any lien he had got by his attachment. He lost any summons of garnishment he may have served, and as we all know it is generally only by a summons of garnishment that a foreign insurance company can be got at at all. And this loss was final. The only way in which the error could be corrected was to file a bill of exceptions as to a final judgment. Suppose the plaintiff, after his attachment was dismissed, should go on and get a final judgment, he would not have a right to except to that judgment, and it is only as incidental to a final judgment that an interlocutory bill of exceptions can come up. The same thing may be said as to the other error complained of. If the plaintiff had gone on against the one company, and got a final judgment against it, he would have no cause of complaint against *that* judgment.

4. Nor do we think his amendment was a waiver of his right to except. The judge certifies that he dismissed the plaintiff's case for misjoinder, and then allowed an amendment. It is the same as though he had stricken out the three

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companies. The motion to dismiss the writ of error is an appeal to technical rules of pleading and practice, which is not, by our law, looked upon favorably.

5. We do not think it was error to refuse plaintiff's motion for a judgment by default. It was plain from the evidence that the defendant did not have the custody of the paper, but that it was lost amongst the lawyers and clerks, and it would have been very unjust to *punish* the defendant. There was no need for the affidavit of the defendant, as by other proof, the court was made aware of the loss, and that the paper was not in the power or custody of the defendant. Judgment reversed.

M. E. MAHER, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

The defendant was indicted prior to June, 1873, in the superior court of Fulton county, for keeping open a tippling house on the 4th day of May, 1873, the same being the Sabbath. He gave bond for his appearance to answer the charge. Pending that indictment he was prosecuted in the city court of Atlanta for the same offense, charged to have been committed on the 8th day of June, 1873, and on this he was regularly tried and convicted by a jury and fined. When called for trial on the indictment, he pleaded this conviction with all necessary averments, alleging that both proceedings were for the same act and offense, and that on the trial in the city court, evidence was introduced by the state as to his guilt on a day prior to the day mentioned in the indictment. On the hearing of a motion to strike the plea, the above facts were admitted by the state to be true :

Held, that the motion should have been overruled and the plea sustained.

Criminal law. *Autrefois convict*. Jurisdiction. Before Judge HOPKINS. Fulton Superior Court. October Term, 1873.

The facts of this case are fully reported in the above head-note.

HILLYER & BROTHER, for plaintiff in error.

JOHN T. GLENN, solicitor general, for the state.

TRIPPE, Judge.

On the hearing of the demurrer to the plea of former conviction, it was admitted by the solicitor general that the offense with which the indictment charged the defendant, was the same act and offense for which the conviction was previously had in the city court. It is not denied that the city court had jurisdiction over such misdemeanors. But the state claims that where an indictment is pending in the superior court, and the defendant has been arrested and given bond, he cannot, if afterwards prosecuted and tried in the city court for the same offense—the same act—plead the judgment of the latter court in bar to the indictment in the superior court. The grounds relied on in support of this position are, that when there is an indictment in a superior court, under which the accused has been arrested, an inferior court has no jurisdiction to prosecute and try the defendant for the same offense, and that if jurisdiction existed, it is the duty of the defendant to plead the former indictment in bar of the proceedings in the inferior court, and a failure so to do is a fraud which disables him from pleading the judgment of the latter court to the indictment. If this position be true, what would have been the situation of the plaintiff in error? He was indicted in the superior court for keeping open a tippling house on the 4th of April, 1873, the same being the Sabbath. He was prosecuted in the city court for committing the same offense, on the 8th day of June, 1873. No one can doubt that he could have committed the two offenses on the two days charged, and that he could have been indicted and convicted of each. Had he been tried and convicted or acquitted, at the term of the superior court at which the indictment was found, he could not have pleaded the judgment against the accusation in the city court, unless he would go further, and show that the prosecution in the city court was for the identical act for which he had been tried in the superior court. The record would have been of no avail, unless supplemented by other proof. So if he had pleaded in the city court the

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pendency of the indictment in the superior court, the record would not have supported a plea that it was for one and the same offense. One would have been for an offense alleged to have been committed on the 4th of April, and the other for the same offense, (same in character) but committed on the 8th of June. The first indictment was found in April, the latter prosecution instituted in August. So the record would not have availed him. Will it be said that he still should have pleaded the indictment to the accusation in the city court, so as to have been ready to sustain an objection at the trial in the city court, to any testimony going back to the period mentioned in that indictment, to-wit: the 4th of May? The state was not bound to prove the day alleged in the indictment. It could prove that the offense was committed on any day prior to the finding of the bill, even since the day stated therein. The only limitation on its right in this respect is, that the proof must be of a day within the time prescribed by the statute of limitations: *Cook vs. The State*, 11 Georgia, 53; *Wingard & Ham vs. The State*, 13 *Ibid.*, 396; *McBryde vs. The State*, 34 *Ibid.*, 202.

So, then, the prosecutor in the superior court could have proven a day subsequent to the time mentioned in the bill of indictment, and if a defendant in the situation of this one, prosecuted in two courts for offenses, though similar in name, yet charged in the respective proceedings against him as two different acts, two different violations of the same law, committed on two different days, is bound on the trial of the last charge brought against him, to meet all these various rights and powers of the prosecution, it would often cast an onus upon him which would work a practical denial of his great constitutional right not to be put in jeopardy of life or liberty more than once for the same offense. If the two records or prosecutions showed on their face the identity of the offenses, the criminal acts, the practical hardship would not be so great upon a defendant. But we do not think that under the facts of this case that plaintiff in error should have been denied his plea; and if he had been convicted and punished

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for the same misdemeanor in the city court, for which the state claimed the power to convict him again, his defense should have been allowed.

Outside of the special facts stated, as shown by the two proceedings, and the reasons, thus far given for the decision we make in this case, and speaking for myself, I am not prepared to sustain either of the grounds upon which it is claimed that the demurrer to the plea should have been allowed. The city court had jurisdiction conferred by law to try this misdemeanor; so did the superior court. I can find no authority for the position that because an indictment has been instituted in one court which had jurisdiction over the offense, therefore any judgment of another court with like jurisdiction, rendered in a prosecution commenced afterwards for the same offense, *was void*. Perhaps the case of *Burdette vs. The State*, 9 Texas, 43, is one decision to that effect. The judgment is put upon the principle that where there are two courts with concurrent jurisdiction, the one first exercising it acquires control of the case to the exclusion of the other. This is true to a certain extent; for a party, if sued in two actions for the same cause, at different terms or in different courts having jurisdiction, may plead the pendency of the first in defense of the second: Code, sec. 2894. But it will hardly be claimed that if a defendant were to fail so to plead, and judgment be taken against him in the second suit and is satisfied, he would be barred from pleading that fact to the first suit, if still pending. Such a failure on the part of a defendant does not give a plaintiff the right to two judgments and a payment of both. The principle was not intended to and does not oust the court in the second suit, of jurisdiction, but its object and effect is to protect a party from two suits at the same time for the same cause of action. It is his duty not to let both judgments go against him. But if the plaintiff does, in fact, get a judgment in either, or a settlement and satisfaction of either, and the other is pending, that fact may be pleaded against it. He cannot say his own proceedings, in which he has obtained satisfaction, are void, and therefore

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pendency of the indictment in the superior court, the record would not have supported a plea that it was for one and the same offense. One would have been for an offense alleged to have been committed on the 4th of April, and the other for the same offense, (same in character) but committed on the 8th of June. The first indictment was found in April, the latter prosecution instituted in August. So the record would not have availed him. Will it be said that he still should have pleaded the indictment to the accusation in the city court, so as to have been ready to sustain an objection at the trial in the city court, to any testimony going back to the period mentioned in that indictment, to-wit: the 4th of May? The state was not bound to prove the day alleged in the indictment. It could prove that the offense was committed on any day prior to the finding of the bill, even since the day stated therein. The only limitation on its right in this respect is, that the proof must be of a day within the time prescribed by the statute of limitations: *Cook vs. The State*, 11 *Georgia*, 53; *Wingard & Ham vs. The State*, 13 *Ibid.*, 396; *McBryde vs. The State*, 34 *Ibid.*, 202.

So, then, the prosecutor in the superior court could have proven a day subsequent to the time mentioned in the bill of indictment, and if a defendant in the situation of this one, prosecuted in two courts for offenses, though similar in name, yet charged in the respective proceedings against him as two different acts, two different violations of the same law, committed on two different days, is bound on the trial of the last charge brought against him, to meet all these various rights and powers of the prosecution, it would often cast an onus upon him which would work a practical denial of his great constitutional right not to be put in jeopardy of life or liberty more than once for the same offense. If the two records or prosecutions showed on their face the identity of the offenses, the criminal acts, the practical hardship would not be so great upon a defendant. But we do not think that under the facts of this case that plaintiff in error should have been denied his plea; and if he had been convicted and punished

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for the same misdemeanor in the city court, for which the state claimed the power to convict him again, his defense should have been allowed.

Outside of the special facts stated, as shown by the two proceedings, and the reasons, thus far given for the decision we make in this case, and speaking for myself, I am not prepared to sustain either of the grounds upon which it is claimed that the demurrer to the plea should have been allowed. The city court had jurisdiction conferred by law to try this misdemeanor; so did the superior court. I can find no authority for the position that because an indictment has been instituted in one court which had jurisdiction over the offense, before any judgment of another court with like jurisdiction rendered in a prosecution commenced afterward for the same offense, *was void*. Perhaps the case of *Burdett v. The State*, 9 Texas, 43, is one decision to that effect. The court put upon the principle that where there are concurrent jurisdiction, the one first exercising jurisdiction has control of the case to the exclusion of the other. It is true to a certain extent; for a party, if sued in two courts for the same cause, at different terms or in different courts having jurisdiction, may plead the pendency of the first as a defense of the second: Code, sec. 2894. It is also claimed that if a defendant were to fail to answer an indictment be taken against him in the second court, he would be barred from pleading the pendency of the first if still pending. Such a failure

does not give a plaintiff the right to payment of both. The pendency of the first does not oust the second of its object and effect. The same thing may be done to let the second court do

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claim to be paid again. So a party accused of a crime, if indicted for it in two courts having jurisdiction over the offense, may plead the pendency of the first against the second, not to show that the court in which the second is pending has no jurisdiction, but to give that court a reason why it should not exercise the jurisdiction over the offense which, by law, it has. But if no such plea be filed, and the accused is tried and judgment rendered, it is not void, as is the judgment of a court having no jurisdiction. If the defendant is convicted and suffers the penalty, he can assert his right not to be punished twice for the same offense.

The head-note in the case of *Mize vs. The State*, 49 Georgia, 375, is, "the plea of *autrefois convict* to an indictment for a misdemeanor in the superior court, may be sustained by proof of such former conviction before an inferior court having jurisdiction of the offense, unless it appear that such indictment was found prior to the prosecution in the inferior court, and that the defendant had been arrested under it." The qualification in the last clause does imply that if the indictment be first found, and the defendant has been arrested, the plea would not be sustained, and doubtless was so construed in making an application of it to this case. But speaking again for myself, I am inclined to the opinion that the principle announced would be good without the qualification. The facts of the case in which that decision was made sustain the judgment without requiring the addition of the proviso, for the record did not show that there had been any arrest.

But, really, can the matter of arresting or not arresting the defendant affect the question of jurisdiction? That is the point now being considered. The superior court has jurisdiction as full and complete over the offense without an arrest, as well as where there is an arrest. The finding of an indictment is a commencement of a prosecution, an assertion of jurisdiction, as much so as if an arrest follows. And if the principle that the first of two courts, having concurrent jurisdiction, which exercises it, acquires control of the case to the exclusion of the other, means that the other court is there-

by ousted of all jurisdiction, and its proceeding would be a nullity, then the same principle would apply in all cases, whether there be an arrest or not, and the Texas decision is the rule in all cases of two prosecutions in two different courts. But the judgment in *Mize vs. The State* is in conflict with that conclusion, and so are the two cases referred to in that decision from North Carolina: 2 Dev. & B., 159; Busbee's Rep., 209; see 1 Bish. on Cr. L., section 679, with notes and authorities cited. I know of no case going as far as the one in the Texas Reports.

As to the other ground taken in the argument, that the failure of defendant to plead the pendency of the indictment was a fraud, no authority was read going to that extent. The cases in 1 N. H., 257; 11 Humph., 599; 1 Swan., 34, and others, were all cases in which it was held that the defendant had by fraud and collusion *procured the prosecution to be instituted against him*, which he afterwards pleaded and relied on. In fact, it is said in some of those cases that the defendant had *managed such prosecution himself*, and that what he had thus procured by fraud he could not avail himself of by way of defense. But even in the case of the State vs. Little, 1 N. H., 257, where it was held that the facts showed the defendant did conduct the prosecution against himself, and consequently could not plead the judgment therein, WOODBURY, Judge, said: "But when prosecutions before the higher courts are managed by the attorney general, the solicitor, or counsel appointed by the judges, and before single magistrates, by similar counsel, or by the party aggrieved, or by disinterested individuals, such prosecutions can never, perhaps, be considered fraudulent, for such persons would be presumed to act with proper views, and when not express, might be deemed implied agents for the state."

One remark suggested by this extract: The solicitor general of the superior court of Fulton county is, by law, the solicitor general of the city court. It is true, in his absence there may be a solicitor general *pro tem.* appointed by the court. This was done in this case. The state—the prose-

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cutor, was represented in the city court by counsel appointed by the judge of that court. No act of fraud on the part of any one has been suggested. There was all the machinery of law—a judge, solicitor general and jury. The power in the city court to punish the accused was ample. He was punished by a fine of \$150 00. In default of its payment, he was adjudged to do public work for six months. He ought not to be punished again, and cannot be, unless a rule of law which does not mean what is claimed for it, overrides one of the most valuable constitutional rights which the citizen has. Judgment reversed.

CASPER W. JONES, JR., plaintiff in error, vs. ISAAC EASLEY
et al., defendants in error.

(TRIPPE, Judge, was providentially prevented from presiding in this case.)

1. Where a tax *fi. fa.* was offered in support of a sheriff's deed to land, and it appeared that the *fi. fa.* was under \$50 00, and that though there was a levy entered thereon, it was not signed by any one, it was not error in the judge to refuse to let the *fi. fa.* be read in evidence, without some proof that the entry was made by an officer authorized to levy such *fi. fa.* Nor does the recital in the sheriff's deed, that he had made such levy, alter the case.
2. A plaintiff in ejectment may recover the premises in dispute, on his prior possession alone, against one who subsequently acquires possession by a trespass without any lawful right whatever, and this is true, though the plaintiff may himself show to the jury no title.

Ejectment. Execution. Judicial sale: Deed. Possession. Before Judge KIDDOO. Randolph Superior Court. May Term, 1874.

Jones brought ejectment against Easley and others, tenants in possession, for lot of land number six, in the sixth district of Randolph county. The defendants pleaded the general issue. The plaintiff relied upon a sheriff's deed made under a sale for taxes, and prior possession. In support of

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the former he introduced in evidence a sheriff's deed dated January 8th, 1870, conveying the property in dispute to him. This instrument recited that the sheriff did, on November 30th, 1869, levy upon, and afterwards expose to sale, said lot, under and by virtue of an execution issued by the tax collector of Randolph county against Casper W. Jones, Sr., trustee. The plaintiff then tendered in evidence two executions, the first of which was dated November 25th, 1869, issued by the tax collector of Randolph county, in favor of the state of Georgia and county of Randolph, for \$22 60, state and county tax for the year 1869, against Casper W. Jones, Sr., trustee. On this *fi. fa.* was an entry of a levy upon the property in controversy, of date November 30th, 1869, but unsigned. Across this entry was written, "settled in full, January 12th, 1870," signed by the sheriff. The second execution was of the same date, and in the same form, except that it was for \$15 00, and against Casper W. Jones, Sr., individually. The entries thereon were the same.

On objection made, the executions were excluded and plaintiff excepted.

The plaintiff showed that the defendants obtained possession of the property by forcibly ejecting his tenant. That after the sheriff's sale aforesaid, A. B. Hendry, who was then in possession of the lot attorned to him, and remained in the quiet and peaceable control of the same until forcibly turned out as above stated.

Plaintiff closed. On motion, a non-suit was ordered, and plaintiff excepted.

Error is assigned upon each of the above grounds of exception.

H. & I. L. FIELDER, for plaintiff in error.

WORRILL & CHASTAIN, for defendants.

McCAY, Judge.

1. The *authority* to sell under legal process depends upon the judgment and levy. These the purchaser is bound to see

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are complete: Code, sec. 2628. A levy on land consists of the entry, signed by the proper officer. That is the only seizure there is in this state: See *Wilson vs. Ansley*, 47 Georgia, 278. Tax *fi. fas.* under \$50 00 must be levied by a constable (Code, section 888,) and returned to the sheriff. Was this levy made by a constable? Who can say? The statute requires the levy to be signed: Code, sec. 3640. Had the party offering this deed offered to have this entry signed, shown that the entry was in fact made by a proper officer, with intent to make a levy, and left unsigned by mistake, perhaps that might have cured the defect. The recital in the deed cannot help the matter. Such recitals are *prima facie* evidence of the acts of the officer other than such acts as enter into his authority to sell, such as the advertisement, place and hours of sale, etc., but the authority to sell stands on a different footing, and must be proven: 16 Georgia, 71.

2. The defendant was a clear trespasser, as the evidence shows he had no lawful right whatever, but was in possession by mere entry. In such cases the plaintiff may recover on his prior possession alone, and that the plaintiff clearly had: Code, sec. 3366.

Judgment reversed.

REED & DANIEL, plaintiffs in error, vs. FRANK M. GALLAHER, defendant in error.

1. When one contracts to ditch for another at a stipulated price per rod, no number of rods being specified, and to receive pay when the work is done, his action therefor cannot be defeated on the ground that it was prematurely brought because a portion of the work was not well done.
2. As the jury made a deduction for the defective work, and the error assigned upon the charge of the court is immaterial, under the view we take of the case, a new trial should not be granted on that ground.

Contracts. Action. New trial. Before Judge BARTLETT. Greene Superior Court. March Term, 1874.

It is unnecessary to the elucidation of any principle in this case to state facts additional to those embraced in the above head-notes.

JOHN C. REED, by J. A. BILLUPS, for plaintiffs in error.

E. C. KINNEBREW, for defendant.

TRIPPE, Judge.

1. The defense is not that the plaintiff failed or refused to ditch a specific number of rods which he had contracted for; nor is it that he had failed to ditch a number sufficient to drain the land, but that a portion of one ditch was not well done and would not properly drain that part of the bottom land in which it was located. It was in proof that a few dollars would make it answer that purpose, and the jury deducted from plaintiff's claim \$10 00 for such defective work. Did plaintiff lose all claim to compensation on account of this defect in a small portion of his work? Defendants assert that the contract was an entire contract, including the character and quality of the work, and if any portion of it was not well done, plaintiff could recover nothing. Addison on Contracts, page 453, states the rule to be, that "a condition in a contract for work and service, that the work shall be done in a workmanlike and proper manner, is not a condition precedent going to the whole root of the action. Such a condition is implied in any contract for work and labor; and if it were a condition precedent to the plaintiff's right to remuneration, any little deficiency would destroy the contract, and deprive the plaintiff of any claim for payment." In this case the defective portion of the work was found by the jury to be but a very small percentage of the whole, and the plaintiff was allowed for that. The plaintiff contracted to ditch for the defendants, no specific number of rods being stipulated for, but the price per rod was agreed upon, and he was to receive pay when the work was done. He did all the ditching that was necessary under the contract, except that a

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small portion was defective. His right of action could not be altogether defeated on the ground that some of the work was not well done. Under the principle quoted from Addison, his action may be maintained, and the defendant could plead the partial failure of consideration to the extent that the character of the ditching was defective and failed to answer its purpose.

2. Under the view we take of the case, it is unnecessary to consider the error assigned upon the charge of the court. If it were error it was an immaterial one, and does not affect the merits of the case.

Judgment affirmed.

MARTHA F. THROWER, plaintiff in error, vs. AMANDA E. WOOD, defendant in error.

1. Where an act of the legislature was passed in 1853, reciting that B was the illegitimate child of A, and the act changed B's surname to that of A, and legitimated him as the child of A; and A afterwards, in 1835, made to B a deed to a parcel of land by the name given to him in the act of the legislature, and the deed was to him as the child of A, and in consideration of the natural love he bore to him as such child:

Held, that the law will presume A assented to or procured the act of the legislature.

2. Whether, as a general rule, such an act does or does not affect persons not assenting to or procuring it, yet, in a suit for and concerning the very land conveyed by the deed, those claiming the land as the legal heirs of B, under and by virtue of the deed, cannot deny that B was the child of A. The facts that the deed was to B in his own name, and as the child of A, and in consideration of A's natural love to him, as such, appearing as they do on the face of the deed, are conclusive in a suit for the land conveyed, of the relationship, as against any person claiming the land under or by virtue of the deed.

Laws. Legitimation. Presumption. Estoppel. Deeds. Before Judge HOPKINS. Fulton Superior Court. October Term, 1873.

Thrower vs. Wood.

Amanda E. Wood instituted proceedings against Martha F. Thrower, as tenant in common with her, for the partition of a lot of land in the county of Fulton, claiming a title to one-sixth undivided interest in the same. The respondent objected to said partition, claiming title to the entire property.

1st. The petitioner introduced a deed from J. F. Trout to Thomas A. Lyon and Warner Lyon, dated August 15th, 1852, conveying to them, as tenants in common, a portion of the lot of land described in the plaintiff's petition.

2d. A deed from Thomas S. Baker, John S. Wilcox and Charles Baker, to Thomas A. Lyon and Warner Lyon, conveying to them, as tenants in common, the remaining portion of said premises, dated May 16th, 1855.

3d. A deed of gift from Warner Lyon to Thomas A. Lyon, Levi Jackson Lyon, and Thomas A. Lyon, as trustee for Martha F. Lyon, conveying to them a one-half undivided interest in said lot of land, "for and in consideration of the natural love and affection which he, the said Warner Lyon, hath and beareth to and for his said children, Thomas A., Levi Jackson, and Martha F. Lyon." This is the only consideration expressed in said deed. The conveying words are, "hath given, delivered and conveyed, and by these presents doth give, deliver and convey." The deed is dated December 6th, 1855, and was recorded December 17th, 1855. The aforesaid three deeds were produced upon the trial by the respondent upon notice from the petitioner.

4th. An agreed copy of the will of Thomas A. Lyon, in which he gives and bequeaths all of his property, both real and personal, to Martha F. Lyon, after reserving enough to pay his just debts and funeral expenses, during her life, and then to her children. The above will was properly executed December 15th, 1857.

5th. A deed from John T. Jenkins to Amanda E. Wood, the petitioner, dated February 25th, 1871, conveying to her all his right, title and interest, to-wit: the undivided one-third of the one-half of the lot of land aforesaid.

6th. A deed from T. K. P. Worthington and Mary Jane

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Northcut to Amanda E. Wood, the plaintiff, conveying to her all their right, title and interest to the said lot of land, dated November 21st, 1870.

7th. The answers of Mary Kilpatrick to interrogatories as follows :

I knew Levi Jackson Lyon ; I knew Elizabeth Worthington ; I have been informed and believe that Levi Jackson Lyon is dead ; I do not recollect when he died ; I believe he died during the war—shortly before the close of the war ; he was single at the time of his death ; he had two sisters and one brother living at the time of his death ; the name of his brother was Thomas ; the name of one sister was Jane, who was married at the time to William Northcut ; the name of the other sister was Charlotte, who was married at that time to Thomas Jenkins ; Charlotte has died since the death of Levi Jackson Lyon ; I forget the date of her death ; the husband of Charlotte, Thomas Jenkins, was living at the time of the death of Charlotte, and is living now, to the best of my knowledge and belief ; Levi Jackson Lyon was my nephew ; his mother was my sister ; both his father and mother are dead ; his father's name was Jacob Worthington ; he died in the Mexican war—I forget the year ; his mother's name was Elizabeth Worthington ; she died about ten or twelve years ago, after her husband died ; I forget when Levi Jackson Lyon died ; to the best of my knowledge and belief he was twenty or twenty-one years old ; he was not married at the time of his death.

The petitioner here closed. The respondent first read in evidence the answers of Rachael S. Robertson and Mary M. Robinson to interrogatories as follows :

Mary M. Robinson knows Amanda Wood and Thomas Thrower, and Rachael S. Robertson knows Thomas Thrower ; do not know the other parties ; they both knew Levi Jackson Lyon, and from a strong family resemblance, believe that he was Warner Lyon's son. All they know, in addition to the above, going to show he was Warner Lyon's son, is that Warner Lyon brought him to the house of Rachael S. Robertson,

one of the witnesses, paid his board, clothed him, and sent him to school.

Cross-examined: They first became acquainted with Levi Jackson Lyon in 1847 or 1848. They were not acquainted with Jacob Worthington nor Elizabeth Worthington; neither were they present when the said Levi Jackson Lyon was begotten and born. Neither witness knows of the death of Jacob Worthington, nor of the death of Levi Jackson Lyon's mother. Both witnesses think Levi Jackson Lyon died in 1856 or 1857. Both answer they were not acquainted with Jacob or Elizabeth Worthington. They did not know anything of Jacob and Elizabeth Worthington living together, nor about Jacob Worthington's volunteering in the Mexican war, nor about his dying there. All they ever heard Warner Lyon say about the parentage of Levi Jackson Lyon was subsequent to the Mexican war, and all they ever knew him to do for said Levi Jackson Lyon, was subsequent to said war, which was in 1847 or 1848, at the time the said Warner Lyon brought him to the house of witness, Rachael S. Robertson.

2d. The answers of Elizabeth Pruitt to interrogatories, as follows: I know none of the parties. I was acquainted with Jacob and Elizabeth Worthington. Said Jacob was a clever, sober man, until his wife, Elizabeth conducted herself as she did. I know nothing myself, except that I have seen her and Warner Lyon go into the woods together and come out again. Does not know what they did. Have seen him go to her house a few times after she and her husband parted. This going to the house was after Levi Jackson Lyon was born. She knew them both fifteen or twenty years. Knew him in Walton and Campbell counties. They were married in Campbell. She heard said Elizabeth Worthington admit that Warner Lyon was the father of Levi Jackson Lyon, sometimes in earnest and sometimes in jest. Warner Lyon treated the child as his own. Said Elizabeth Worthington was under a very bad character. She was a dissipated woman. She had been separated from her husband about a year or more

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when her last child was born. Has heard them dispute and quarrel about Warner Lyon. She was not a witness in the effort of Elizabeth Worthington to get a land warrant. Was applied to but declined.

Cross-examined: Elizabeth and her husband, Jacob Worthington, were living together when Levi Jackson Lyon was begotten and born, but they separated before he went off to the Mexican war. Does not know how long that was after the birth of the said Levi Jackson Lyon. All that she has stated she heard from others, except their separation, going into the woods together and quarreling, which she heard and saw herself. Has not stated that Jacob Worthington was not the father of Levi Jackson Lyon, for she does not know. Has no personal knowledge that any person had sexual intercourse with the said Elizabeth Worthington while she and her husband were living together.

3d. The depositions of W. H. Kilpatrick, as follows: I knew nothing of the relation, friendship, intimacy and connection which existed between Warner Lyon and Elizabeth Worthington; Elizabeth Worthington is my wife's sister; the character of Elizabeth Worthington, about the time Levi Jackson Lyon was got and born, so far as I know, was as fair as that of any poor people; Warner Lyon took the child and put him to school; Jacob Worthington and his wife did not separate until he went into the army, so far as I know; I think the child was running about when he went into the army.

Cross-examined: I think Worthington and his wife lived together as man and wife until he went to the army, about the time Levi Jackson Lyon was begotten. Worthington was generally about home, and lived with his family until he went to the army.

4th. The depositions of W. M. Butt, as follows: I knew Levi Jackson Lyon, and his mother, Elizabeth Worthington, about the time said Levi Jackson Lyon was begotten and born. I lived within one mile of them, at Pine Mountain, in Carroll county, Georgia. I knew Warner Lyon, and he

resided nearer to Elizabeth Worthington than I did. Warner Lyon boarded said Levi Jackson Lyon at my house, and paid his board.

Cross-examined: Jacob and Elizabeth Worthington lived together as man and wife about three years before the birth of Levi Jackson Lyon, and up to the time that it was understood said Jacob went to the army, which was some time in the fall or summer of 1847. Said Jacob was usually about home about the time that Levi Jackson Lyon was begotten.

5th. The answers of Mary Kilpatrick to interrogatories, as follows: She knows Amanda Wood and Thomas Thrower; does not know Martha Thrower; she was acquainted with Elizabeth Worthington from the time of her birth until her death, which was about thirty years, from 1830 to 1860; she was her sister. She knows nothing of the conduct of Elizabeth Worthington with Warner Lyon about the time Levi Jackson Lyon was begotten and born, except that she saw Warner Lyon at her house occasionally. She was living with her husband, Jacob Worthington; knows nothing going to show that Warner Lyon was the father of the child. Never heard said Elizabeth admit that Warner Lyon was the father of the child; but when she came to see witness, the latter reproached her about the rumors about her. She replied that "want leads and the devil drives." Does not know that Warner Lyon ever treated the boy as his child; knows that he gave the boy a few clothes, i. e., a suit or two. There was a disagreement between said Elizabeth and Jacob, her husband, about the time Levi Jackson Lyon was born, about the rumors of intimacy between said Elizabeth and Warner Lyon; does not know how long they lived together afterwards, nor that they separated until Worthington went to the war; does not know anything further going to show that he was Warner Lyon's child, nor that he was so regarded by his sister, Warner Lyon or anybody else. Knows of her own knowledge that said Elizabeth had another child after her husband left for Mexico; said child was born more than a year after her husband left; does not know whose child it was reported to be.

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Cross-examined: All the children born unto Worthington and his wife up to the time her husband left for the Mexican war were recognized by them as their children, and they lived peaceably and quietly together, so far as she knows, up to the time he left for the war, except the family quarrel about the rumors about Warner Lyon. Levi Jackson Lyon was recognized by Jacob Worthington as his child up to the time he left for the Mexican war, and he was usually about the house the time said Levi was begotten and born. The said Jacob and his wife were lawfully married in Campbell county, but does not remember the date, and lived together, as far as she knows, up to the time said Worthington left for the Mexican war. Has stated all she knows going to show that he was said Jacob's child, lawfully begotten. Never heard his mother say that he was the said Jacob's child, but always, when asked, she would say that was best known to herself.

6th. An act of the legislature of Georgia, approved February 20th, 1854, found on page 489 of the acts of 1853-4, as follows:

"Section 3. And be it further enacted, by the authority aforesaid, that the name of Levi Jackson Worthington, of the county of DeKalb, be changed to that of Levi Jackson Lyon, and that he be fully legitimated and made an heir at law of Warner Lyon, his reputed father, and entitled to all the rights and privileges he would have enjoyed, had he been born in lawful wedlock, and be made capable of inheriting the estate, both real and personal, of Warner Lyon, his reputed father."

The jury found for the petitioner. The respondent moved for a new trial upon the following grounds, to-wit:

1st. Because the verdict was contrary to law.

2d. Because the verdict was contrary to the evidence, and manifestly and decidedly against the weight of the evidence, and without any evidence to support it.

3d. Because the court erred in charging the jury "that the deed of gift from Warner Lyon to Thomas A. Lyon and

Levi Jackson Lyon, and Thomas A. Lyon, trustee for Martha F. Lyon, December 6th, 1855, conveyed to said Levi Jackson Lyon the title to a one-sixth undivided interest in the said land, described in the petitioner's declaration, if they should find that such a deed was executed by Warner Lyon."

4th. Because the court erred in charging the jury as follows, to-wit: "If you should believe from the evidence that Elizabeth Worthington was the mother of Levi Jackson Lyon, and was the lawful wife of Jacob Worthington, and that at the time said Levi Jackson Lyon was begotten and born, her husband had access to her, there would be a *strong presumption* in favor of his legitimacy. Has it been shown to your satisfaction that Levi Jackson Lyon was the illegitimate child of Warner Lyon? The proof must establish the fact clearly and satisfactorily to your minds before you can say by your verdict that said Levi Jackson Lyon was an illegitimate child."

5th. Because the court erred in charging the jury "that if they believed that the said Levi Jackson Lyon died intestate, leaving no wife or issue, and at the time of his death he had living two sisters, Jane Northcut, who was married at the time to William Northcut, and Charlotte Jenkins, who was married at the time to William Jenkins, and one brother, Thomas Worthington, and that he, the said Levi Jackson Lyon, was the legitimate child, born in lawful wedlock, of Jacob and Elizabeth Worthington, that, in that event, the title to the one-sixth of said land described, descended to his said two sisters and one brother, they being his heirs at law."

6th. Because the court erred in refusing a motion for a nonsuit made by the defendant's counsel when the plaintiff closed her case.

7th. Because the court erred in charging the jury as follows: "The act of the legislature legitimating Levi Jackson Lyon, was admitted merely to show the fact that Warner Lyon had him legitimated, and its recitals are not evidence of the fact that Levi Jackson Lyon was the illegitimate child of Warner Lyon."

The motion was overruled and respondent excepted.

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D. F. & W. R. HAMMOND, for plaintiff in error.

COLLIER, MYNATT & COLLIER, for defendant.

MCCAY, Judge.

Were the dispute between the parties in this case a dispute between either of them and a third person, or even between themselves, about anything else than *this particular land*, we should not hesitate to affirm this judgment. The charge of the court, as to the presumption of legitimacy, where there is a possibility of access, is not stronger than the Code, section 1786. The words, strong presumption and clear evidence are the very words used by the codifiers. Nor do we think the judge, by adding the word satisfactory, has given any expansion to the rule. "Clear and satisfactory" is no stronger than "clear." Indeed, it rarely strengthens a statement, but rather weakens it, to heap up adjectives, when one that conveys the whole idea has been already used. So, too, as to the presumptions arising from the act of 1855. We are not prepared to say that a private act of the legislature is operative, as a general rule, in any way against those who are neither parties to its procurement, or in some way privies to it. It is true that there are authorities giving absolute verity to an act of Parliament, and there are expressions used even by our own judges looking the same way. But the express division of powers in our constitution, by which the legislature only has legislative power, is a large qualification upon these ideas, and whilst we are clear that such an act is not conclusive, except as we have said, we are not even prepared to say that it is even *prima facie* as against perfect strangers to it. But however this may be, as a general rule, both as to these presumptions against adulterine bastardy and in reference to private acts of the legislature as against strangers, we are of the opinion that in this case, under the facts disclosed by the record, the law bearing upon these points has not been administered.

1. As Warner Lyon, after the act of 1855 was passed, has, by his deed of December of that year, evidently acted on it by making the deed under which both parties in this suit claim their rights, it is a very fair presumption that he procured the act of 1855 to be passed. This deed is to the grantee in the name the act gives him, and as the child of Warner Lyon. As the grantee had neither the name nor the legal relationship without the act, it is but a reasonable inference to assume that Warner Lyon either procured or assented to its passage.

2. Both of the parties in this case set up title to the land in dispute, under the deed of Warner Lyon to his three *children* made to them after the passage of the act of February, 1855, to-wit: December 6th, 1855, and that deed is in terms in consideration of the *natural* love and *affection* he, Warner Lyon, has to and for such *three children*. One of these children was Levi Jackson Lyon, the assumed ancestor of the defendant in error. Her claim to the land in dispute is dependent on that deed; it is her muniment of title, the very foundation of her right. If she has any *status* in court in this dispute, she gets it under that deed. The land in dispute is in the possession of the Lyon family, who got it and hold it under the same deed. Were it not for that deed the land in dispute would belong to neither of the parties to the suit. It would have remained Warner Lyon's. He might have sold it or given it away, or at his death it would, under our law, have been assets for the payment of his debts, and distribution among his heirs, with a right of dower in his widow.

The case before us is simply this. In a dispute about a parcel of land, when both parties claim under the same deed, is it competent for one of them to set up title under the deed, and in the same breath deny the very terms of it? Is it competent for the defendant in error to insist, as she must do, that Levi Jackson Lyon acquired title to the land in dispute by virtue of the deed of December 6th, 1855, from his father, Warner Lyon, and in the very same breath say I claim the

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land by purchase from the Worthingtons, who are the legal heirs of Levi Jackson Lyon, *because the deed recites an untruth* as to the paternity of Levi Jackson Lyon, because he was *not* the child of Warner Lyon; his name was not *Levi Jackson Lyon*, but *Levi Jackson Worthington*, and Warner Lyon could not and did not have for him the natural love and affection of a father? It seems to us that to state such a proposition is enough. It answers itself. One cannot claim under deed and deny its terms. The parties to a deed and their privies are estopped by its recitals: *McClesky vs. Leadbetter*, 1 *Kelly*, 557.

As a matter of course, the recital, to be an estoppel, must be something material. Here it is the very essence of the deed. Without the recital it would never have been made. Upon the very face of the deed it is stated that the sole and only motive of it, is the fact that Levi Jackson Lyon is the child of Warner Lyon. To deny this fact, is to strike at its very vitals, to destroy its foundation, to make it invalid, as without consideration. All deeds made and operating under the statute of uses, were, under the English law, required to be on their face, for a valuable or a good consideration. Before the statute of uses, they did not pass a legal title, they were only of force in equity, which enforced them because a valuable consideration having been paid, or they having been made in fulfillment of a duty to provide for a kinsman, the chancellor held the grantor bound in conscience to perform. Deeds made only for friendship or good will, stood on a different footing, and were not enforced by equity for want of this ingredient in them to bind the conscience of the grantor; and since the statute of uses, which in effect made such deeds legal titles, the uniform ruling of the English and American courts has been, that deeds of this kind—and all *our* deeds are such—must be for either a valuable or good consideration. And our Code, section 2690, has the same provision. A good consideration must be the love and affection of either blood or marriage: Cruise Digest, (Greenleaf,) book 4, page 24. Even the affection of a man for his bastard son, is not

sufficient: *Blount vs. Blount*, 2 Law Reports, 587. See this whole subject fully discussed in *Shephard's Touchstone*. The denial therefore, that Levi Jackson Lyon was the child of Warner Lyon, and the assertion that his name was not Lyon but Worthington, is a denial of a material part of the deed. It is a denial of the declared motive and purpose of the deed, and an assertion that its recitals upon that subject are untrue. The case, is, in our view, as strictly within the principle of an estoppel by deed as a case can be. It is not only within the letter but the spirit of the rule.

The petitioner in this case, comes into court claiming this land: 1st. Because the deed says Levi Jackson Lyon was the child of Warner Lyon; and 2d, because he was not the child of Warner Lyon. To get the property *into* the ancestor, it is necessary to show a deed declaring him such child, and then to prevent its taking the course the law gives it, if that were so, it is asserted that he was not such child. In our judgment this cannot be done. If the plaintiff relies on the deed, she cannot at the same time contradict it. She cannot come into the Lyon family, and having got property as one of it, take it out of the family line by the relationship that obtained it. Nor is this view of it met by saying that the deed may still be true, under the act of 1855, that is that Levi may be the child of Warner as to him, and not the child as to the Worthingtons, by construing the act as an adopting act, and not a legitimating act. This only shifts the estoppel from the deed to the act. The plaintiff below cannot go to the act for one purpose and claim title by it, and refuse to accept it entirely. Warner Lyon is only himself bound by the act because he assented to it, and he would not have done this except on its terms; except upon the assumption of the very fact that is now denied. We do not say this defendant is bound by this act generally, but we do say she cannot set it up to get this land into Levi and then divert it from Lyon's line by denying it. She cannot plead either the act or the deed, and deny its material recitals. This act and its recitals, and this deed and its recitals, are necessities in order to get

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the land in dispute *into* Levi, and it is neither justice to the Lyon family, nor is it law to pass it by inheritance out of the Lyon family, by denying these recitals. For these reasons we think this verdict wrong, and that in *this* case, and under the state of facts before the court, the judge erred in refusing to charge that the act of 1855 was evidence against the plaintiff. As the case stood before the jury, the evidence that Levi Jackson Lyon was the lawful child of Warner Lyon was conclusive. As against the plaintiff and for the purposes of this trial, to-wit: a dispute concerning this land, the plaintiff had herself, introduced evidence which was conclusive against her upon that question.

Judgment reversed.

LUCIUS C. MITCHELL, trustee, plaintiff in error, vs. JOSHUA KING, defendant in error.

1. A verdict in a claim case finding the property levied on not subject, is not illegal because the claimant did not show title to but one undivided half of the land when the plaintiff neither showed the possession of the defendant in execution or any title in him, except as to the one-half interest, and which claimant proved had been previously sold at a tax sale and his title under it.
2. Under the charter and ordinances of the city of Rome in 1863, an advertisement by the marshal of a sale under a tax *fi fa.* for thirty days was sufficient.

Claim. Tax. Rome. Before Judge BUCHANAN. Floyd Superior Court. January Term, 1874.

At the July term, 1866, of Floyd superior court, Mitchell, as trustee for Minerva E. Hicks, recovered a judgment based on attachment proceedings, against Lewis Campbell and John W. B. Nowlin, to be levied of certain property in the city of Rome therein specified. Execution issued, and a levy was made on October 9th, 1866. A claim was interposed by King.

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The plaintiff showed title in Campbell to an undivided half of the property in controversy. The claimant showed title out of him by virtue of a sale made under an execution in favor of the Mayor and Council of the city of Rome for taxes due for the year 1862, on the first Tuesday in January, 1863; also title in himself from the purchaser at this sale. It appeared that the advertisement of the property under the levy of the tax execution had only been for thirty days.

The jury found the property not subject. The plaintiff moved for a new trial because the verdict was contrary to the law and the evidence, and because the court erred in charging the jury that the advertisement of said property for thirty days, under the levy of the tax execution, was all that the law required. The motion was overruled and plaintiff excepted.

WARREN AKIN; MITCHELL & GLENN, for plaintiff in error.

SMITH & BRANHAM, for defendant.

TRIPPE, Judge.

1. One exception is, that the verdict finding the whole property not subject was against the evidence, because claimant only showed title of any sort to one-half. The reply is, that the plaintiff did not show title to but one-half in the defendants or either of them. Title to one-half was set up by the proof as having been in Nowlin. The plaintiff himself proved that Nowlin had conveyed that half to his co-defendant, Campbell, before the levy of the attachment. No possession was shown in Nowlin or Campbell after the levy. Therefore no *onus* was cast upon the plaintiff except as to the title to one-half. If he met the proof as to that half, he was entitled to the verdict finding the whole not subject. The whole property was levied on and claimed.

2. The other question is, was the advertisement of the levy and sale by the city marshal of Campbell's half interest,

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for thirty days, sufficient? It is admitted that under the charter and ordinances of the city of Rome, in 1863, such sales were governed by the same rules and regulations which obtained in cases of sales for taxes due the state, and that the law in reference to judicial sales governed such tax sales. That law required an advertisement for thirty days where property had been returned to the receiver by the owner or agent and the tax not paid. But it is claimed that section 819 of the Code applied to this case. That section is, if the property *has not been returned by any one*, the tax collector shall, as soon as it is assessed, issue an execution for the tax, and the advertisement of the sale shall be for ninety days. But this is not applicable to this case. One witness states that he was agent for Campbell, and gave in the property to be taxed one year. Another witness states that that agent did give it in the year before the sale, that the tax was not paid, and that the property was sold to pay it, and the title of claimant arises under this sale. If this be so, the law as to advertisements for ninety days does not apply, nor had the act in Cobb's Digest, 1047 and 1048, any application under the facts of the case.

Judgment affirmed.

MILES HILL, plaintiff in error, vs. THE STATE OF GEORGIA
defendant in error.

1. An indictment under section 4528 of the Code, prohibiting the carrying of pistols, etc., to any court of justice, etc., is sufficiently certain and full, which alleges that the carrying was "to and at a court of justice, then in session, in and for the four hundred and twenty-sixth district, Georgia Militia."
2. Article I., section 14, of the constitution of 1868, which is as follows: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed; but the general assembly shall have power to prescribe the manner in which arms may be borne," does not prohibit the general assembly from making it penal to keep and bear arms in the presence of courts of justice.

Criminal law. Constitutional law. Before Judge RICE.
White Superior Court. May Term, 1874.

It is unnecessary to an understanding of this decision, to report any facts additional to those stated in the above head-notes.

C. H. SUTTON ; UNDERWOOD & WILLIAMS, for plaintiff
in error.

EMORY SPEER, solicitor general, by W. B. THOMAS, for
the state.

MCCAY, Judge.

1. We think the description sufficient. Under our Code, if the offense is set out in the language of the Code, that is sufficient. The indictment alleges that the pistol was carried at, and in the presence of, a court of justice, then in session in the four hundred and twenty-sixth district, Georgia militia. This is in the very words of the act. What was the name and nature of the court is matter of description. It would have been well to state it. Though, as the justice's court is the only civil court that can meet at such a place, the words used do, in effect, describe the court in question as the justice court for that district.

2. The other question made in this record is a far graver one. It is insisted that the act describing the offense charged and fixing the penalty, is an infringement of the right of the citizens of this state as guaranteed by the constitution of the United States and of this state. It is now well settled that the amendments to the constitution of the United States of March 4th, 1789, are all restrictions, not upon the states, but upon the United States. And this would seem to be the inevitable conclusion from the history of these amendments as well as from their nature and even their terms. I do not myself assent to that other limitation of the legislative powers of our general assembly insisted upon in the argument,

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and sometimes announced by courts, to-wit: the "higher law," which is appealed to as above even the constitution. At last, therefore, if this act be unconstitutional it must be because it is in conflict with our state constitution. Article I., section 14, of the constitution of 1868 is as follows: "A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed; but the general assembly shall have power to prescribe by law the manner in which arms may be borne." The act of October, 1870, upon which this indictment is based, is in these words: "No person in said state shall be permitted or allowed to carry about his or her person any dirk, Bowie-knife, pistol or revolver, or any kind of deadly weapon, to any court of justice or any election ground or precinct, or any place of public worship, or any other public gathering in this state, except militia muster grounds."

Were this question entirely a new one, I should not myself hesitate to hold that the language of the constitution of this state, as well as that of the United States, guarantees only the right to keep and bear the "arms" necessary for a militiaman. It is to secure the existence of a well regulated militia; that, by the express words of the clause, was the object of it, and I have always been at a loss to follow the line of thought that extends the guarantee to the right to carry pistols, dirks, Bowie-knives, and those other weapons of like character, which, as all admit, are the greatest nuisances of our day. It is in my judgment a perversion of the meaning of the word arms, as used in the phrase "the right to keep and bear arms," to treat it as including weapons of this character. The preamble to the clause is the key to the meaning of it. The word "arms," evidently means the arms of a militiaman, the weapons ordinarily used in battle, to-wit: guns of every kind, swords, bayonets, horseman's pistols, etc. The very words, "bear arms," had then and now have, a technical meaning. The "arms bearing" part of a people, were its men fit for service on the field of battle. That country was "armed" that had an army ready for fight.

The call "to arms," was a call to put on the habiliments of battle, and I greatly doubt if in any good author of those days, a use of the word arms when applied to a people, can be found, which includes pocket-pistols, dirks, sword-canes, toothpicks, Bowie-knives, and a host of other relics of past barbarism, or inventions of modern savagery of like character. In what manner the right to keep and bear these pests of society, can encourage or secure the existence of a militia, and especially of a well regulated militia, I am not able to divine. But assuming that the guarantee of our state constitution was intended to include weapons of this character, (which, considering that it was made a part of the constitution after the decision of *Nunn vs. The State*, in 1 *Kelly*, is not improbable,) we still are of the opinion that the act of October, 1870, is not unconstitutional. The practice of carrying arms at courts, elections and places of worship, etc., is a thing so improper in itself, so shocking to all sense of propriety, so wholly useless and full of evil, that it would be strange if the framers of the constitution have used words broad enough to give it a constitutional guarantee. Take the clause in its largest sense; let the word "arms" include weapons of every kind; we think its guarantee would not cover so absurd, useless, defiant, and disorderly a practice as this act of 1870 forbids. Upon its very front, as we have said, the object of the clause is declared to be to secure to the state a well regulated militia. Has this declaration no significance? Is the clause to be interpreted without reference to it? On the contrary, by the well settled rules for the interpretation of laws, as well as by the dictates of common sense, the object and intent of the law is the prime key to its meaning. A well regulated militia may fairly mean—"the arms-bearing population of the state, organized under the law, in possession of weapons for defending the state, and accustomed to their use." The constitution declares that as such a militia is necessary to the existence of a free state, the right of the people to keep and bear arms shall not be infringed. To effect this end, the right to have arms would

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seem to be absolute, since without this right, it would not be possible to attain the end contemplated, to-wit: an armed militia, organized and ready for the public exigencies. But it is obvious that the right to bear or carry arms about the persons at all times and places and under all circumstances, is not a necessity for the declared object of the guarantee; nay, that it does not even tend to secure the great purpose sought for, to-wit: that the people shall be familiar with the use of arms and capable from their habits of life, of becoming efficient militiamen. If the general right to carry and to use them exist; if they may at pleasure be borne and used in the fields, and in the woods, on the highways and by-ways, at home and abroad, the whole declared purpose of the provision is fulfilled. The right to keep and to bear arms so that the state may be secured in the existence of a well regulated militia, is fully attained. The people have, or may have the arms the public exigencies require, and being unrestricted in the bearing and using of them, except under special and peculiar circumstances, there is no infringement of the constitutional guarantee. The right to bear arms in order that the state may, when its exigencies demand, have at call a body of men, having arms at their command, belonging to themselves and habituated to the use of them, is in no fair sense a guarantee that the owners of these arms may bear them at concerts, and prayer-meetings, and elections. At such places, the bearing of arms of any sort, is an eye-sore to good citizens, offensive to peaceable people, an indication of a want of a proper respect for the majesty of the laws, and a marked breach of good manners. If borne at all under the law, they must be borne openly and plainly exposed to view, and under the circumstances we allude to, the very act is not only a provocation to a breach of the peace, but dangerous to human life. The constitution is to be construed as a whole. One part of it is not to be understood in such a sense as will militate against another. It is as well the duty of the general assembly to pass laws for the protection of the person and property of the citizen as it is to abstain from any in-

fringement of the right to bear arms. The preservation of the public peace, and the protection of the people against violence, are constitutional duties of the legislature, and the guarantee of the right to keep and bear arms is to be understood and construed in connection and in harmony with these constitutional duties.

Section 5 of the bill of rights is in these words: "The right of the people to appeal to the courts, to petition government in all matters and peaceably to assemble for the consideration of any matter, shall not be *impaired*." Is this section violated if the courts are not always in session? If the legislature restrict the appeal to certain times and places, and under certain reasonable conditions necessary for the public good; if it pass a statute of limitations, or regulate the rules of evidence or provide that one judgment of the court shall be conclusive, all these are limitations upon the right to appeal to the courts. But they are necessities of society, and are enacted because this guarantee of the right to appeal to the courts is not all of the constitution, and is to be construed in reference to the fact that there are other duties cast upon the legislature besides keeping this right of appeal to the courts unimpaired. So, too, of the right to petition government upon any matter. Has a witness upon the stand, or a jurymen in the box, a right to quit his post of duty and obstruct the progress of business by devoting himself to the preparation of a petition to the government for a redress of grievances? So, too, there is a guarantee of the right of the people peaceably to assemble for the consideration of any matter. May they assemble *any* where, on *any* land, in *any* house, and that against the consent of the owner? Obviously, all these provisions and guarantees are to be construed in reference to their nature, and to other clauses and other duties of the constitution. One guarantee is not to swallow up all others, but each is to be construed reasonably in reference to its plain intent, and in reference to other duties cast upon the legislature, and other rights guaranteed to the people. The right to go into a court-house and peace-

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fully and safely seek its privileges, is just as sacred as the right to carry arms, and if the temple of justice is turned into a barracks, and a visitor to it is compelled to mingle in a crowd of men loaded down with pistols and Bowie-knives, or bristling with guns and bayonets, his right of free access to the courts is just as much restricted as is the right to bear arms infringed by prohibiting the practice before courts of justice.

The right peaceably to meet and worship God, or to vote for public officers, or to do any other public duty, are rights just as sacred, just as solemnly guaranteed, and just as necessary for the existence of a free state as the right to bear arms, and either of them is seriously interfered with if it is the right and the custom of "people" to attend such meetings armed as though for battle. Under such circumstances those assembled are under the protection of the law. They are met at the command or under the permission of the law, and it is a high constitutional duty of the state to protect them, to see that good order is preserved, and that they may perform the purpose of their assembling unmolested by terror, or danger, or insult. To suppose that the framers of the constitution ever dreamed, that in their anxiety to secure to the state a well regulated militia, they were sacrificing the dignity of their courts of justice, the sanctity of their houses of worship, and the peacefulness and good order of their other necessary public assemblies, is absurd. To do so, is to assume that they took it for granted that their whole scheme of law and order, and government and protection, would be a failure, and that the people, instead of depending upon the laws and the public authorities for protection, were each man to take care of himself, and to be always ready to resist to the death, then and there, all opposers. We do not so believe, and we are not ready so to suppose. On the contrary, we take it for granted that they meant what they have said, and that in guaranteeing the right to keep and bear arms, they never dreamed they were authorizing practices, common enough, it is true, among savages, and not unusual even in the olden

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time, when every man was at war with his neighbor, but utterly useless and disgraceful in a well ordered and civilized community. We suppose that in view of what they deemed a necessity of a free state, to-wit: the existence of a well regulated militia, they guaranteed to the people, not only the right to have and keep arms, but the right so to use them as to become familiar with that use, so that when an exigency of the state arose, they would be ready and capable for its defense. And we are driven, for these reasons, to the conclusion, that the right to keep and bear arms is not infringed if the exercise of it be by law prohibited at places and times when a proper respect for the majesty of the law, a sense of decency and propriety, or the danger of a breach of the peace, forbid it.

We have thus far considered the question as though the provision referred to had no other limitations than those deduced from the preamble, from the nature of the right and from the other duties cast by the constitution upon the legislature. But it must be remembered that as a qualification to the very guarantee itself, it is expressly and in terms provided, that "the general assembly may prescribe the *manner* in which arms may be borne." It is contended that this is only a permission to the legislature to prohibit the carrying of arms secretly upon the person. But it seems a very unfair criticism upon the language used so to confine it. One cannot help inquiring why, if this alone was the intent, apt and proper words expressing it, were not used. It would have been more simple and more apt to say "but the legislature may prohibit, by law, the carrying of arms secretly upon the person." Instead of this, the words used are "the legislature may prescribe the manner in which arms may be borne," implying more than one prohibition, and conveying the idea of various restrictions upon the general guarantee. If the words "manner of bearing arms" covers only the particular way in which they may be carried upon the person, as openly or secretly, on the shoulder or in the hand, etc., it would be illegal for the legislature to prohibit one from going into a crowd

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with a loaded pistol cocked and capped and set with a hair trigger, since this would not be a restriction on the mode of carrying, but upon the kind of pistol carried, and yet we doubt if any court would hesitate to say that such an act might not be prohibited, nay, it would, under the general rules of law, be a piece of criminal negligence, that in case of an accident, causing death, would go far to make the offender guilty of murder. We do not think the words "manner of bearing arms," have any such confined and limited signification. The words are used in their ordinary signification, and were intended to limit the broad words of the previous guarantee. Those words had granted the right "to keep and to bear arms." As we have seen, the object of the provision was to secure to the state a well regulated militia. The simple right to carry arms upon the person, either openly or secretly, would not answer the declared purposes in view. Skill and familiarity in the use of arms was the thing sought for. The right to "tote" them, as our colored people say, would be a bootless privilege, fitting one, perhaps, for playing soldier upon a drill ground, but offering no aid in that knowledge which makes an effective, to-wit: a shooting soldier. To acquire this skill and this familiarity, the words "bear arms" must include the right to load them and shoot them and use them as such things are ordinarily used, so that the "people" will be fitted for defending the state when its needs demand; and when the constitution grants to the general assembly the right to prescribe the manner in which arms may be borne, it grants the power to regulate the whole subject of using arms, provided the regulation does not infringe that use of them which is necessary to fit the owner of them for a ready and skillful use of them as a militiaman. Any restriction which interferes with this is void, whether it relates to the carrying them about the person, or to the place or time of bearing them.

The manner of bearing arms includes not only the particular way they may be carried upon the person, that is openly or secretly, on the shoulder or in the hand, loaded or

unloaded, cocked or uncocked, capped or uncapped, but it includes, also, the time when, and the place where, they may be borne. It is no reply to this view of the subject to say that if the legislature may do this, they may, in effect, prohibit the carrying them altogether. The same reply may be made to the admitted right to prescribe the manner of carrying arms upon the person. If the legislature were to say arms shall not be borne on the shoulder, nor in the hands, or on the arms, but they shall only be borne strapped or fastened upon the back, this would be prescribing only the manner, and yet, it would, in effect, be a denial of the right to bear arms altogether. The main clause and the limitation to it are both to be construed reasonably, and in view of the declared object of the provision. Any act would violate it that militated against the purpose, and no act is in violation of it that leaves the citizen the right to keep arms, and so to carry and use them as will render him familiar with their use, so as that he will be prepared for public service as a militiaman when needed. Within their limits, the legislature may prescribe the manner of bearing arms, including in this manner the mode in which they shall be carried upon the person, and the time, place and circumstances in which they may be borne. Nor is this an unfair or unusual sense of the word manner. In that "well of English undefiled," the common version of the Bible, from whence, without question, the great mass of our people get the use and meaning of words, more than from any other example, the word manner is often used in this signification.

In Numbers, 9th chapter, 14 verse, it is commanded that a stranger shall keep the passover according to the *manner* thereof, to-wit: as described in the 11th verse of the same chapter; and in Exodus, 12th chapter, 3-11: "On the 14th of the second month, at even, in a house, with the loins girded, the shoes on the feet, a staff in hand and in haste." So in the 4th chapter of Ruth, Boaz had, with his kinsman, gone to the *gate of the city* into the presence of the elders, and there, his kinsman, had pulled off his shoe to Boaz, in order to re-

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lease his claim upon certain land which had belonged to the family of Ruth's husband; and the 7th verse says: "Now this was the *manner* in former times in Israel concerning redeeming and changing, and confirming all things,"

In Deuteronomy 25th chapter, 7th and 9th verses: This "manner" is prescribed in detail, and includes the place, the persons present and the special act to be done, to-wit: pull-off the shoe, and passing it. So in 1st Samuel 8th and 9th verses, Samuel undertakes to tell the Jews "the manner of the king" they were longing for, and he proceeds to present him as a tyrant who would do as he pleased with their sons and daughters, their servants and their lands and themselves. So Christ was buried as the *manner* of the Jews was to bury, including the time and place, the spices and the tomb: John 19th chapter and 40th verse. So the water-pots, the contents of which were turned into wine, were after the "manner of purifying of the Jews:" John 2d chapter and 6th verse. So it is said in Hebrew, 1st chapter and 1st verse: "God who, at sundry times and in divers *manners*, hath *spoke* to your fathers by the prophets." This, without doubt, includes not only when he spoke to Moses, "mouth to mouth apparently, and not in dark speeches," but when he revealed himself by dreams or visions, by his finger on the tables of stone on the mount, or by Urim and Thummin, in the holy place. And it will be found that the "manner" of doing a thing often, both in looks and in speech, includes the time and place as well as the precise detail of the special act itself. If I were to ask an old farmer his manner of sowing turnips, is it supposable that he would leave out the time, the dark nights in August, or the character of the land, and the mode of preparing it? We think, therefore, that under the power expressly granted to prescribe the manner in which arms may be borne, the legislature may prescribe, not only that they shall be borne openly and plainly exposed to view, but that it may prohibit the bearing at such times and places, and under such circumstances, as is necessary for the preservation of the peace, the protection of the person and property of the

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citizens, and the fulfillment of the other constitutional duties of the legislature, provided the restriction does not interfere with the ordinary bearing and using arms, so that the "people" shall become familiar with the use of them.

Judgment affirmed.

ROBERT C. PATTERSON, plaintiff in error, *vs.* WILLIAM BAGLEY, defendant in error.

When the levy in a claim case was dismissed by the court, with judgment for cost for claimant, although it be for a cause which may not be a legal ground for the dismissal of the levy, yet the plaintiff in execution cannot proceed to the trial of the claim case under the same levy, unless this order of dismissal be set aside or reversed.

Claim. Execution. Judgment. Before Judge JAMES JOHNSON. Chattahoochee Superior Court. March Term, 1874.

On March 17th, 1869, an execution in favor of Robert C. Patterson against George H. Kelly *et al.*, for \$95 00 principal, \$15 50 interest and costs, based on a judgment rendered by the superior court of Chattahoochee county, on March 29th, 1861, was levied upon certain lands as the property of Kelly. A claim was interposed thereto by William Bagley. Upon the trial of the issue thus formed it appeared that at the September term, 1871, of said court, an order was passed dismissing said levy, because no affidavit of the payment of taxes had been filed, and directing a judgment for costs in favor of the claimant. It was insisted by counsel for plaintiff that said order, having been based on an unconstitutional law, was null and void, and that said levy was not affected thereby. The court held that there was no case before it; that said levy had been dismissed by said order, and that it could do nothing in the premises. To which ruling plaintiff excepted.

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LITTLE & CRAWFORD; H. BUSSEY, by brief, for plaintiff in error.

E. G. RAIFORD; B. A. THORNTON, by brief, for defendant.

TRIPPE, Judge.

The court below held that as the levy had been dismissed by the judgment of the court, although a reason not good in law might have been assigned, yet as long as that judgment remained unreversed or was not set aside, there was no case in court; that the claim case was disposed of by the dismissal of the levy; and further, that a judgment was not void simply because a wrong reason was given for it. The subject matter before the court was the levy, the claim, and the issue growing out of it. The court had jurisdiction of all that, and a judgment rendered thereon was not void because a ground not good in law was assigned as a reason for it. If the pleadings are so defective that no legal judgment can be rendered, the judgment may be arrested or set aside. Or when a judgment has been rendered either party may move in arrest thereof, or to set it aside for any defect not amendable which appears on the face of the record or pleadings. A motion in arrest must be made during the term at which the judgment was obtained. A motion to set it aside may be made at any time within the statute of limitations: Code, sections 3587, 3588, 3589. None of these sections make such a judgment void, a nullity. Where they are not void, the proper steps should be taken either in arrest or to set them aside. A case dismissed is out of court, although an erroneous reason is assigned for the dismissal, and the proper proceedings must be taken in order to avoid its effect.

Judgment affirmed.

NANCY S. WOFFORD, plaintiff in error, vs. SUSAN GAINES,
defendant in error.

1. When a promissory note, given for land, and payable to the vendor and negotiable, went into the hands of a third person, and whilst he was the owner of the same it was renewed by the maker and a party added as security and the new note made payable to the holder:

Held, that this is not such a novation of the original contract as that a homestead laid off in the land, is not subject to be levied on and sold to satisfy a judgment founded on the renewed note. The debt is still for the purchase money of the land.

2. A homestead laid off under the act of 1868, is subject to debts contracted prior to July, 1868. The judgment setting the homestead apart, does not conclude creditors to whose debts the homestead is subject, and the debtor takes it, *cum onere*.

Homestead. Novation. Promissory notes. Before Judge McCUTCHEN. Bartow Superior Court. December Adjourned Term, 1873.

An execution in favor of Susan Gaines against Wade H. Wofford, was levied upon certain realty which was claimed by Nancy S. Wofford. Upon the trial of the issue thus formed the following facts appeared:

In the year 1850, Wade H. Wofford purchased the land in controversy from James Gaines, giving two negotiable notes therefor, each in the sum of \$500 00. These notes were renewed at different times and payments made thereon, until the debt assumed the shape of one note in the hands of Aaron Gaines. This note was again renewed by the maker and security given. This instrument was purchased by the plaintiff and again renewed to her, Robert Rogers being given as security. Suit was brought thereon, judgment obtained and the execution levied upon the land in controversy. The claimant had the same set apart to her as a homestead under the act of 1868.

The court charged the jury as follows: "If you find that the defendant *in fi. fa.*, bought the land from James Gaines and gave his notes for the purchase money, and that these notes were afterwards renewed, no matter how often they

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were renewed, nor how many new parties were introduced, provided the defendant Wade H. Wofford always remained as maker of such notes, such renewed notes would still be for the consideration money of the land, in the meaning of our constitution, so long as the consideration of the new notes can be thus traced, by renewal, back to the original notes which were given for the land."

To this charge the claimant excepted.

The court refused to charge as follows: "If the land has been set apart by the judgment of the court of ordinary to claimant as a homestead, the plaintiff is concluded by such judgment exempting the land from levy and sale, notwithstanding the debt is older than the constitution of 1868, and the law passed in pursuance of the same. The plaintiff has had her day in court when the homestead was applied for and granted, either with or without objection from her."

To this refusal the claimant excepted.

The jury found the property subject. Error is assigned upon each of the above grounds of exception.

JOHN W. WOFFORD, for plaintiff in error.

A. JOHNSON; WARREN AKIN; A. M. FOOTE, for defendant.

McCAY, Judge.

1. The common law idea of a novation, is when A is indebted to B, and B to C, and by mutual agreement B is dropped out, and in consideration of this, A becomes debtor to C. In this way it was competent as it were to transfer a *chose* in action. This is the novation of the Code, section 2724; a new person is introduced to whom the obligation is due. In the case before us, the note was payable to the payee or bearer. It is admitted that if the renewal had been to the original payee, though a security was added, there would have been no such novation as made a new contract. But when the renewal was made the note belonged to the bearer,

and the question is, did the renewal to him alter the case? We think not. The note was payable to him. He was contracted with, in terms, at the giving of the note. This has been formally held by the supreme court of the United States in reference to the jurisdiction of the United State courts, in suits brought by holders of notes payable to bearer. And this is a fair view of the nature of such a contract. The maker, in terms, contracts to pay to the bearer. When the note goes into the hands of the bearer he is the party to it. If it be renewed, it is renewed with one of the parties to it, and the renewal is simply a contract fixing a new day as to the same matter and with no new or different consideration. No new party to whom the obligation is due is introduced. We think, therefore, this was no such novation as made this a new debt not in existence in July, 1868, at the adoption of the homestead law.

2. We are clear that under the decision of the supreme court in *Gunn vs. Barry*, the land is subject to the debt. There is nothing in the judgment setting the homestead apart that affects the question. The homestead is good, subject to the debt, as it is to other excepted debts. Had the holder of this debt made the issue that the land could not be set apart as against him, and submitted to a decision that it could, he would be barred. But he was not bound to do this; he had a right to stand by, let the homestead be set off, considering that it was laid off subject to his debt. This has been our uniform holding as to all the exceptions. And at last, that is all that is claimed here. It is not denied that there is a homestead, but that it is good against this debt. It is insisted that this is an excepted case, that the homestead was laid off subject to it. We think the judgment ought to be affirmed.

Judgment affirmed.

Campbell vs. The Atlanta and Richmond, etc., Company.

JAMES M. CAMPBELL, plaintiff in error, vs. THE ATLANTA AND RICHMOND AIR LINE RAILROAD COMPANY, defendant and in error.

1. In the case of an injury to an employee of a railroad company, caused by the running of a train, whilst the burden is on the company to prove that it used proper care and diligence, it is necessary for the plaintiff to show that the injury was caused without fault or negligence on his part.
2. The judge before whom the case was tried being dissatisfied with the verdict, and he having granted a new trial, this court cannot say that the evidence was such as to show that there was an abuse of discretion by the court below, and we are of opinion that there should be another investigation of the case.

Railroads. Presumption. New trial. Before Judge RICE. Gwinnett Superior Court. September Term, 1873.

James M. Campbell brought case against the Atlanta and Richmond Air-Line Railroad Company for \$10,000 00 damages, alleged to have been sustained by him through the negligence of the defendant. The record fails to disclose any plea. The evidence made the following case:

On November 22d, 1872, the plaintiff was in the employment of the defendant as a track-raiser, receiving wages at the rate of \$1 00 for each day he worked, out of which he was to board himself. By direction of the officers of the defendant, at the time of the injury, he was, with other employees, engaged in distributing telegraph poles along the line of the road. The poles were thrown off of the cars, at a signal from the foreman, as the train moved slowly along. Those engaged in the work stood on the poles which remained on the cars, and from this fact their foothold was very unsteady. to throw each pole successfully from the cars, it was necessary to raise it above the standards which were located along the sides. Plaintiff was near the centre of the car at the time of the accident. The pole was raised, and at the signal from the foreman, was thrown, but the end at the rear of the car failed to clear the standards. The front end went over and struck the ground about eight feet from the cross-

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ties, and as the train moved on the pole swung round against the middle standard. Plaintiff took hold of the pole and held it until it threw him off the car on to the ground and fell on top of him. The poles were round, from twenty-four to twenty-six feet long, from ten to twelve inches through at the butt end, and tapered off. The foreman immediately jumped off the car and took the pole off plaintiff. He was lying on his back and side, his eyes rolled back, frothing at the mouth and senseless. He was carried to Duluth, and on the way to that point requested some one to fan him. Had he stepped over the pole as it was swung around by the moving of the train he would not have been hurt. Whether this could have been done, taking into consideration the insecurity of his footing, was a matter of some doubt. The fault, if any, was with the employees at the rear of the car, who failed to clear the standard with their end of the pole. The plaintiff was twenty-two years of age at the time of the injury, healthy and sound in every particular. His memory, sight and speech have been impaired seriously therefrom, probably for life. Is compelled to use a stick to feel his way in walking and to wear deep colored glasses to protect his eyes. Is unable to do any work. Has no property and is utterly dependent upon his labor for a support. He testifies that he supposed the injury was caused as much by his own fault as by that of others, if there was any fault at all. His board was proven to have been worth about \$12 00 per month. The probable duration of his life was shown by the insurance tables, to be about forty years longer. He had no family. His physicians' bills were paid by the defendant.

Hill, a witness introduced by the plaintiff, stated that the injury resulted from the fault of the plaintiff as much as of any one else; that it was a pure accident.

The jury found for the plaintiff \$4,500 00. The defendant moved for a new trial because the verdict of the jury was contrary to law and evidence, and because the damages assessed were excessive. The motion was sustained and plaintiff excepted.

Campbell vs. The Atlanta and Richmond, etc., Company.

WINN & SIMMONS; W. W. CLARK; HILLYER & BROTHER, for plaintiff in error.

JAMES P. SIMMONS; JASPER N. DORSEY; COLLIER & SON, for defendant.

TRIPPE, Judge.

Under section 3033 of the Code, an employee of a railroad company would not be entitled to recover damages for an injury sustained by him, caused by the negligence of other employees of the company. Without sections 2083 and 3036, he would be under the common law rule, and could not maintain an action. Section 3033 puts the burden upon the company in all cases where damage is done by the running of its train, to make it appear that its agents have used all ordinary and reasonable care and diligence. Section 3036, in giving a right to employees which they did not have, says, if the person injured is himself an employee of the company and the damage was caused by another employee, *and without fault or negligence on the part of the person injured*, his employment by the company shall be no bar to the recovery. Construing these sections together, their true intent and meaning is, that whilst the company must prove that its agents have used proper care and diligence, it is necessary for the employee who sues, to show that the injury was caused without fault or negligence on his part. In such a case, the contest is between an employee and the company on account of alleged negligence on the part of other employees. The construction we give the provisions of the Code quoted, makes it incumbent on both sides, to show the discharge of their duty. On the part of the plaintiff, that he was without fault or negligence, to entitle him to recover; and on the part of the company, that its agents, the other employees, were not wanting in care and diligence, to entitle it to a successful defense against a claim for damages, for which it otherwise would be liable.

Davant *et al.* vs. Carlton.

2. The judge before whom the case was tried was dissatisfied with the verdict and granted a new trial. We do not feel authorized to say he abused his discretion, and are of opinion that there should be another investigation of the case.

Judgment affirmed.

JAMES M. DAVANT, executor, *et al.*, plaintiff in error, vs.
RICHARD G. CARLTON, defendant in error.

1. Where, on a motion to set aside a judgment on the ground that the defendant had never been served with process, and had not appeared or acknowledged service, it appeared in evidence on the trial of an issue formed in the matter, that there was a due return by the sheriff of personal service:

Held, that it was error in the court to refuse to charge the jury, that under the law it required the strongest evidence to overcome the effect of the sheriff's entry, and to charge in lieu thereof that the sheriff's entry was *prima facie* evidence, but like other presumptions it might be rebutted by proof.

2. Where there was a confession of judgment by an attorney of the court, whose name was marked on the bench docket, and seven years had elapsed, and the attorney was dead, it should require the strongest testimony to show want of authority of the attorney, and even then it ought to appear by the oath of the defendant that he had a good defense, and what that defense was.

Judgments. Service. Presumptions. Attorneys. Before Judge BARTLETT. Greene Superior Court. March Term, 1874.

This case is sufficiently reported in the above head-notes.

REESE & REESE, for plaintiffs in error.

P. B. ROBINSON; M. W. LEWIS & SON; C. L. BARTLETT, for defendant.

MCCAY, Judge.

1. By the common law, the entry of the sheriff, in a case like this, was conclusive: *Higgs vs. Huson*, 8th Georgia, 321.

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The party injured, if the return was false, had his remedy against the sheriff. Our Code, section 3340, provides that the entry of service is traversable. The evils of such a practice, at least, after judgment, are so manifest, especially since the defendant may now be a witness, that we think the public interest requires the strongest proof that the entry is false, before it should be set aside. That same public policy that made such an entry conclusive, should, now that it is made traversable, give it high rank as evidence when it is sought to be contradicted. The statute itself, Code, section 3340, declares that unless done at the next term after the party has notice of it, he cannot do it afterwards. The *negative* statement of a party that he never was served, bears no comparison in strength with the entry itself. It is, in the first place, the sworn entry at the time, of an officer of the court, with no interest to enter contrary to the fact, and with no motive or even occasion to do so. If the entry be untrue, he is liable for damages as well as punishment. That the sheriff cannot now call up the act of service, is very natural, and is of but very slight importance, and that the defendant can say positively that this service was not made seven years ago, is more than most men would be willing to say in the face of this entry. State it as strongly as he may, it is, at last, only negative testimony; a statement that he does not remember to have been served; true, he says, in terms, he was not, but all he can mean is that he has no memory of it. The reasons he gives are only arguments why his failure to remember the fact should have strength. If an entry of service by the sheriff is to be set aside by the oath of the defendant seven years after it is made, then a judgment is but a poor record. As we have said we think, in the nature of things, such an entry is very strong evidence, and whilst it is impossible to fix accurately its weight as compared with other evidence, we think it is entitled to at least the dignity asked for it in the charge requested. It should only be set aside on very satisfactory proof of its incorrectness. It should require the *strongest* testimony to rebut it.

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2. As to the second point in this case, to-wit: the confession, it is to be looked at in two aspects. If assuming there was no service, the entry of answer, and the confession, are to be taken as a waiver; then, perhaps, under the proof in this case, this confession may not have been made under such circumstances as would give it that effect. But assuming the entry of the sheriff to be true, and the court to have had jurisdiction by notice to the defendant, we think the provisions of the Code, section 411, should be construed very strictly against the party complaining of the want of authority. The statute says that the court must be *fully satisfied* that such allegation of want of authority is true, and when so satisfied, it *may relieve* the party from the consequences of his acts. Assuming, as we have said, that the sheriff's return is true, the confession is a small matter—there was a judgment by default—no plea—and the verdict would have been a mere matter of form. It is our opinion, that in such a case, the court ought to require proof of merits. If a defendant asks relief from the unauthorized act of an officer of court, he should show what were the consequences of the act. He should show that he is hurt and how. Had he a defense? What was it? If the thing sought to be relieved against is a mere form, the court will not alter its records. Should, therefore, this be found not to be a false return, then to take advantage of the assumed want of authority of the attorney, it should appear that the defendant has been injured, and how, and the injury must be real; had he a good defense, and what?

Judgment reversed.

SALMONS & ALEXANDER, plaintiffs in error, vs. HOYT & JONES, defendants in error.

A promissory note payable "at Hoyt & Jones," does not, upon its face, show that it was made for the purpose of negotiation at a chartered bank. Nor is the fact that suit thereon is brought against the indorsers

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by Hoyt & Jones, and who are described in the declaration as "lately bankers doing business under the name, style and firm of Hoyt & Jones," sufficient to prove that Hoyt & Jones is a chartered bank, although protest fee is claimed in the petition.

Promissory notes. Indorsers. Protest. Before Judge HOPKINS. Fulton Superior Court. April Term, 1874.

Hoyt & Jones, "lately bankers doing business in the city of Atlanta," brought assumpsit against Salmons & Alexander, as indorsers upon a note made by Chapley B. Wellborn, dated October 21st, 1871, and due at thirty days, for \$500, payable at "Hoyt & Jones." Plaintiffs, in their declaration, also claimed \$3 25 for noting and protesting. The defendants pleaded that said note was made for negotiation at a chartered bank, to-wit: the bank of said plaintiffs, in said county, and no notice of non-payment and protest was given to them as required by law.

Plaintiffs introduced the note in evidence and attempted to prove protest and notice, but failed. The defendant moved for a non-suit. The motion was overruled and defendants excepted.

The court charged the jury that protest and notice were unnecessary unless the evidence showed that the note was payable at a chartered bank.

The jury found for the defendants. The plaintiffs moved for a new trial because the verdict was contrary to law, the charge of the court, and the evidence. The motion was sustained and the defendants excepted.

Error is assigned upon each of the above grounds of exception.

A. W. HAMMOND & SON, for plaintiffs in error.

JOHN M. CLARK & SON, for defendants.

TRIPPE, Judge.

The note on which suit was brought was payable at "Hoyt & Jones." The action is in the name of "Henry O. Hoyt and Darwin G. Jones, lately bankers doing business in the city of Atlanta, under the name, style and firm of Hoyt &

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Jones." The exception is that there was error in the court's granting a new trial, because there was no proof of a protest for non-payment, and notice thereof, to the indorsers, after a verdict for the defendants. No protest of such papers is necessary unless they "are made for the purpose of negotiation, or intended to be negotiated at a chartered bank:" Code section 2781. This note is certainly not on its face payable at a chartered bank. Hoyt & Jones are not even in it called "bankers." In the declaration they are called "lately bankers, doing business, etc., under the name, style and firm of Hoyt & Jones." A coporation does not sue in the individual name of the corporators as these plaintiffs do, nor can it be properly called a *firm*. The use in the declaration of the words "lately bankers, using the firm, style," etc., does not raise the presumption that they were a chartered bank. We know of no statute, state or federal, making "Hoyt & Jones" a corporation or a chartered bank. Nor does the fact that a protest fee is claimed in the declaration, show it. They are not entitled to recover it, it is true, because they are not chartered. The mere claim of such a fee does not burden them with all the rules applicable to a chartered bank. It is a well known fact, that protests are continually being made, of papers not required by law to be protested for non-payment, and in suits brought upon them, the protest fee is claimed. It would be a hard rule that imposes upon such plaintiffs the strict legal regulations applicable to banks proper.

Judgment affirmed.

MAYOR AND COUNCIL OF THE CITY OF ATHENS, plaintiff in error, *vs.* **CRAWFORD W. LONG *et al.***, defendants in error.

The judgment of a superior-court rendering a *mandamus* absolute, cannot be brought up by writ of error to this court under sections 8213, *et seq.*, of the Code, in reference to injunctions and other extraordinary remedies in equity. (R.)

Clark *vs.* Pearson *et al.*

Mandamus. Practice in the Supreme Court. Before the Supreme Court. July Term, 1874.

This case was sought to be brought up to this court under the provisions of the Code in reference to injunctions and other extraordinary remedies in equity. The bill of exceptions was filed to a judgment making a *mandamus* absolute. Counsel for plaintiff in error moved to have the case entered on the docket for the present term. The motion was overruled, the court enunciating the principle embraced in the above head-note.

COBB, ERWIN & COBB; T. W. RUCKER; S. P. THURMOND, for plaintiff in error.

SPEER & THOMAS, for defendants.

WARREN J. CLARK, plaintiff in error, *vs.* JONATHAN PEARSON *et al.*, defendants in error.

Where the records of the inferior court of a certain county, when sitting for ordinary purposes, show that administration was granted on the estate of "Jonathan Pearson, late of this county, deceased;" and it appears in proof that the Jonathan Pearson, who is the party plaintiff in the action on trial, was a resident of such county a few years prior to the grant of administration:

Held, that there was *prima facie* evidence of the identity of the deceased person with the plaintiff; and the force of such evidence is strengthened, when it is not answered by the plaintiff, or by those who use his name for the assertion of their claims.

Ejectment. New trial. Newly discovered evidence. Before Judge HOPKINS. DeKalb Superior Court. March Term, 1874.

This case was a common law action of ejectment in the name of Doe, upon the demises of William Ezzard, as executor of Merrell Collier, deceased, and of Eli J. Hulsey,

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against Roe, and Warren J. Clark, tenant in possession, for a portion of a lot of land in DeKalb county. The suit was commenced on March 4th, 1872. At the September term, 1873, a demise was added in the name of Jonathan Pearson, in reference to which evidence was alone introduced upon the trial, and upon which the plaintiffs solely relied for a recovery. The defendant pleaded the general issue and the statute of limitations.

The jury found for the plaintiffs. The defendant moved for a new trial upon the following, among other grounds:

Because the defendant has discovered since the trial of said case, that he can show by the records of the court of ordinary of Wilkinson county, and other competent evidence, that Jonathan Pearson died in the year 1839 or 1840.

In support of this ground were the usual affidavits of defendant and his counsel as to diligence, etc. Also the affidavit of Wiley Holland, made in Wilkinson county, to the effect that he knew Jonathan Pearson in his lifetime, and that he died in 1839 or 1840. Also an exemplification from the records of the inferior court of Wilkinson county, sitting for county purposes, showing the appointment of Joel Rivers, as administrator upon the estate of Jonathan Pearson, deceased, on March 2d, 1840.

The title upon which the plaintiff relied for a recovery, was a grant from the state to Jesse Brown, Sr., of Wilkinson county, of date January 13th, 1826, and a deed from said Brown to Jonathan Pearson, of the same county, of date January 14th, 1826.

The court overruled the motion upon the ground that the newly discovered evidence would not probably have changed the result. To which ruling the defendant excepted.

L. J. WINN; HILLYER & BROTHER, for plaintiff in error.

WILLIAM EZZARD, for defendants.

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TRIPPE, Judge.

The recovery was had on the demise of Jonathan Pearson. The motion for a new trial is on the ground that Pearson was dead at the time of trial, and that the fact was not known to the defendant until afterwards. The question in the case is, was there such proof of the identity of Jonathan Pearson, the plaintiff, with the one proven to be dead, as to entitle the movant to a new trial, or to set aside the verdict. The deed introduced by plaintiff below from the drawer to Jonathan Pearson, describes Pearson as residing in Wilkinson county, in 1826. It is true, that the affidavit of Holland does not state that the Jonathan Pearson he knew resided in Wilkinson county. But he does say that he died in 1839 or 1840, and his affidavit was made in Wilkinson. Then comes the record of the court of ordinary of Wilkinson county, showing that administration was granted on 2d March, 1840, on the estate of Jonathan Pearson, late of said county, deceased. Here there was identity of name and residence, and where such proof was not answered by the plaintiff or those who were using his name, the force of it was greatly strengthened. If the real Jonathan Pearson, in whose name the recovery was had, was living, it was a matter of easy proof, at least, by himself or his counsel, or those who used his name to assert their rights. A judgment cannot be rendered in the name of a deceased person without representation. We think, without any counter-proof, the testimony was *prima facie* sufficient: See 5 Cowan, 237; 9 *Ibid.*, 140; 13 Johns., 518; 4 Doug., 33; 9 M. and W., 75; 4 T. R., 28; 2 Green. Ev., section 278. We are, therefore, of opinion that the new trial should have been granted.

Judgment reversed.

McIntyre vs. Hurst et al.

DANIEL C. MCINTYRE, plaintiff in error, *vs.* ROBERT T. HURST *et al.*, defendants in error.

Where exception is taken to the refusal to grant an injunction, and the case is brought to this court, and no order is taken setting it for trial, it will be dismissed when the heel of the docket is reached. (R.)

Injunction. Practice in the Supreme Court. Before the Supreme Court. July Term, 1874.

This case was called when the heel of the entire docket was reached, it remaining open. Counsel for defendants moved to dismiss the writ of error because the exception was to the refusal of the chancellor to grant an injunction, and no order had been taken setting the case at any particular point on the docket for trial. The motion was sustained and the principle embraced in the above head-note enunciated.

GURLEY & GOODE, for plaintiff in error.

H. J. & A. T. MCINTYRE; C. P. HANSELL, for defendant.

THE GEORGIA RAILROAD AND BANKING COMPANY, plaintiff in error, *vs.* WILLIAM D. SEYMOUR, administrator, defendant in error.

1. When a suit is brought against the Georgia Railroad Company, *ex contractu*, in a county other than Richmond, although the defendant may plead to the merits, it is incumbent on the plaintiff to show that the contract was made or to be performed in the county where the suit is brought, and on failure of the plaintiff to make such proof, the defendant may move to dismiss for want of jurisdiction.
2. Where an agent of the Georgia Railroad Company, in the county of Greene, is claimed by the principal office at Augusta to be in arrears, and he pay up, at Augusta, the amount claimed, and afterwards sues to recover back the money, this is a suit on an implied contract to repay the money if not properly paid, and it is neither made or to be performed in Greene county.

TRIPPE, Judge, dissented.

Georgia Railroad and Banking Company vs. Seymour.

Railroads. Contracts. Jurisdiction. Pleadings. Before Judge BARTLETT. Greene Superior Court. March Term, 1873.

John C. Carmichael brought assumpsit against the Georgia Railroad and Banking Company for \$627 90, besides interest. The defendant pleaded the general issue. Upon the trial the plaintiff testified, in brief, as follows: Was agent of the defendant at Greensboro for eight months; after he ceased to be agent, he went to Augusta to the office of the principal bookkeeper of the defendant, for a settlement; he admitted that he owed the defendant \$263 02; said bookkeeper told him that the books in his office showed that plaintiff was indebted to the defendant, in addition to the above amount, the sum of \$627 90; he also threatened to sue the plaintiff and his securities unless he paid up the last amount. Rather than suffer his securities to be annoyed by a suit, he paid up said sum; this suit is brought to recover that amount.

At this stage of the case the defendant moved to dismiss the action for want of jurisdiction in Greene superior court. The motion was overruled and defendant excepted.

The jury found for the plaintiff. The defendant moved for a new trial, amongst other grounds, because the court refused to dismiss the suit for want of jurisdiction. The motion was overruled and defendant excepted.

The plaintiff having died after writ of error brought, his administrator was made a party in this court.

J. A. BILLUPS, for plaintiff in error.

REESE & REESE, for defendant.

MCCAY, Judge.



1. The case of a suit against a railroad company in a county other than the county of its principal place of business, is one where the jurisdiction turns on the subject matter. It is not the case of a plea of want of jurisdiction of the person;

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that is waived by appearance and pleading to the merits. But in these cases the right to sue in the county in which the suit is brought turns on the locality of the cause of action. It must appear on the face of the pleadings that the cause of action originated, that is, that the contract was made or to be performed in the county; it is that which gives the jurisdiction, and that was alleged in this declaration, and it was the duty of the plaintiff to prove it. To do so involved an inquiry into the whole case, and a plea to the jurisdiction would have involved an inquiry and a trial of the merits. In such cases the denial of the plaintiff's right to recover denies the jurisdiction. Would a party, by failing to plead to the jurisdiction in abatement, in an action of ejectment, waive the right to have an action to try titles tried in the county where the land lies? We think this is just such a case. The jurisdiction is of the subject matter; that cannot be conferred by waiver. If it appear on the trial, the party may except. If he failed to except or object, and the proper allegations were in the declaration, he would be barred. But he does this as soon as it appears from the plaintiff's proof (which he must make) that the court does not have jurisdiction of the subject matter. Suppose in a justice court the suit was for \$99 00, and it appeared on the trial that the claim was in fact for \$105 00, how can the defendant know what the plaintiff will prove until by the facts, as the plaintiff makes them, the truth appears? We think this is not the case of a plea to the jurisdiction of the person, but an objection that the plaintiff has, by his own proof, shown that the court has not a right to try the subject matter.

2. Under the facts as proven, the case was not one which the superior court had power, under the law, to try; the contract was not made or to be performed in Greene county: Code, section 3406. The money, if paid improperly, was paid in Richmond, and the law raised, if it was paid improperly, an implied promise then and there to pay it back; that is the plaintiff's right of action.

Judgment reversed.

Branch *vs.* Baker.

WARNER, Chief Justice, concurred.

TRIPPE, Judge, dissenting.

I do not think there was any error in the judgment of the court below in overruling the motion for a continuance, and also the motion for a new trial, because of the *laches* and want of diligence on the part of defendant, and dissent from the judgment of reversal based upon the other grounds.

In my opinion, where such an action as the one in this case, is brought against a railroad company, and the defendant pleads to the merits, including a plea of set-off, and does not plead to the jurisdiction, it (the company) cannot, on the trial, raise an objection to the jurisdiction by motion to dismiss, because of facts appearing in the proof that the contract was neither made nor was to be performed in the county where suit is pending. Such omission to plead, and such pleas to the merits, amount to a waiver of the question of jurisdiction as much as they would in cases of suits against individuals. The residence of an individual defendant is as much a necessary condition to the jurisdiction, in a suit against him, as are the facts which are required to give jurisdiction in an action against a railroad company, conditions necessary to sustain the latter suit. If it is a right or privilege which may be waived in the one case, it is the same in the other, and whatever will amount to a waiver by the citizen, will be equally so when done by the corporation.

JOHN P. BRANCH, plaintiff in error, *vs.* ALFRED BAKER, defendant in error.

MILES G. DOBBINS, plaintiff in error, *vs.* JOSIAH SIBLEY, defendant in error.

[These cases were argued at the January term, 1874, and the decision withheld.]

1. Actions brought by the *bona fide* holders of bank bills which were issued by the bank payable to bearer, and which passed into circulation

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as money, cannot be controlled by the provisions of the second paragraph of the seventeenth section of article five of the constitution of 1868, nor can the illegality of such issue by the bank, as contemplated in said provision, be set up as a defense against the right of such holder to a recovery.

2. If said provisions of the constitution were intended to apply to such cases, they are void under the tenth section of the first article of the federal constitution, inasmuch as they not only annul subsisting contracts which were otherwise legal and valid, but impose upon the holder of such bills impracticable conditions in cases of certain defenses, and which practically deny all right of recovery.
 3. The measure of recovery by the owners of bank bills in an action against a stockholder in the Mechanics' Bank is to be ascertained from the amount of outstanding bills of the bank at the time action is brought, and such stockholder's liability therefor is in proportion to his share of stock in the bank, subject to be reduced by the amount of bills he has taken up before the commencement of the suit against him.
- McCAY, Judge, dissented.

Constitutional law. Banks. Stockholders. Before Judge GIBSON. Richmond Superior Court. April Term, 1873.

It is only necessary to report the first of the above stated cases. The second is similar to it in all material respects.

Branch brought assumpsit against Baker, a stockholder in the Mechanics' Bank, to recover the amount due on certain bills or notes issued by the said bank, and which came into the possession of plaintiff in due course of trade, and for a valuable consideration, making the sum of \$36,680 00 besides interest; and for which judgment had been rendered in favor of said plaintiff against said Mechanics' Bank at a previous term of said court, and executions issued thereon, which had been returned with the entry of *nulla bona* thereon, previous to the commencement of said suit.

The defendant pleaded as follows:

1st. That the evidences of indebtedness, to-wit: the bank bills on which said suit is predicated, and in said plaintiff's declaration named, were given, used, issued, and put into circulation by the said Mechanics' Bank during the late rebellion against the United States, to-wit: on the 22d day of

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October, 1861, with the intention and for the purpose of aiding and encouraging said rebellion.

2d. That said bills were last issued and put into circulation by the said Mechanics' Bank to the late so-called Confederate States government, through its officers and agents, during the late rebellion against the United States, to-wit: on the 22d day of October, 1861, and on divers other days during the same year, as a loan to said Confederate States, and that it was the purpose and intention of the said Confederate States government, and of the said officers and agents in procuring said loan and receiving said bills, to aid and encourage said rebellion, and that fact was known to the said Mechanics' Bank.

3d. That at the time said bills were last issued by said bank, the said bank was amply able to redeem and pay the same, and the said plaintiff, or those under whom he claims, failed, and neglected to demand payment thereof, with full knowledge that the means of said bank were constantly diminishing, until said bank failed and became insolvent.

4th. That said plaintiff is not a *bona fide* holder for value of said bills, and did not receive the same in due course of trade, nor while said bills were circulating as money, but that he bought the same on speculation, at a very low rate, to-wit: at not more than five cents on the dollar, and after the said bills had ceased to circulate as money, and said bank had ceased to do business.

5th. That the capital stock of said bank is five thousand shares, of the nominal value of \$100 00 each, of which this defendant owns three hundred and eight shares, and that all the bank bills of said bank issued and unredeemed, amount to \$1,500,000 00 or less, and that all of said bills were issued before the first day of June, 1865, and none of them on or since that day, and that against said bank no action had been brought on any of said bills prior to the first day of January, 1870, except on \$500,000 00 thereof, or a less amount.

6th. That of the total amount of outstanding unredeemed bills of said bank, not less than \$1,375,000 00 were issued to

the Confederate States and the state of Georgia, during the late civil war, for the purpose, and with the intention and with the knowledge that they would be so used, to aid and encourage the rebellion then being made against the United States, and have not been re-issued since said illegal issue.

7th. That before the commencement of said suit, to-wit: on the 18th day of December, 1869, and on divers other days before the 31st day of December, 1869, this defendant paid and redeemed bills of said Mechanics' Bank, then outstanding and unredeemed, to the amount of \$58,000 00.

The plaintiff demurred to the first plea of defendant, on the following grounds:

1st. The clause of the constitution of Georgia, section 17, paragraph 2d, on which the plea is based, does not embrace bank bills or notes.

2d. The plea does not allege that any contract was made between the plaintiff and defendant, or any other parties, with the intention and for the purpose of aiding and encouraging said rebellion; nor that it was the purpose of any one of said parties to said contract to aid and encourage the said rebellion, such purpose being made known to the other party.

3d. Said clause of the constitution of Georgia is void, being in conflict with the constitution of the United States, as it impairs the obligation of these contracts.

And to the second plea on the same grounds. And to the third, on the ground that it does not allege that the plaintiff was the holder of said notes or bills, at any time when said bank was able to pay and redeem the same.

And to the fourth, on the ground that it is not a proper defense to said action, plaintiff being a *bona fide* holder of said bank notes or bills, for value, and entitled to recover the full amount named on the face of said notes or bills.

And to the sixth, on the grounds of demurrer set forth to the first and second pleas.

And to the seventh, on the following grounds:

1st. Said defendant has not redeemed the said amount of bills named in his plea, at their value when first issued by

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said bank, or at the value named on the face of said bills or notes ; but that said defendant bought them at a depreciated rate since said bank became insolvent, to-wit : at not more than ten cents on the dollar, and after said bills had ceased to circulate as money, and said bank had ceased to do business.

2d. Said defendant is bound by the charter of said bank to redeem or pay the full value of said bills in proportion to his number of shares as a stockholder in said bank, as said value is stated on the face of said bills, at the time they were first issued by said bank.

3d. Upon the grounds of demurrer set forth to the 1st and 2d pleas of said defendant.

4th. Upon the ground that this suit is founded on a judgment against Mechanics' Bank, rendered in said superior court of Richmond county, at the term of said court; and the said defendant cannot set up as a defense to this suit any plea that would have been good as a defense to said judgment against said Mechanics' Bank, or that would collaterally attack or invalidate said judgment.

The court overruled the demurrers to defendant's pleas, except that to the fourth. To which ruling plaintiff excepted.

In the further progress of the cause, the following agreement of counsel as to the facts of the case, was submitted to the jury as evidence :

"In the suits in Richmond superior court, of John P. Branch against sundry parties (separate suits,) as stockholders of the Mechanics' Bank, in which the undersigned are opposing counsel, it is agreed that the following facts shall be considered in evidence—subject to objections to relevancy and legality—and subject also to be shown incorrect by either party by evidence.

"1st. That the Mechanics' Bank was incorporated, and issued notes for circulation.

"2d. That the several defendants in said suits are stockholders to the amounts stated in the several declarations.

"3d. That the plaintiff has the bills named in his suits,

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and had them at the commencement of his suits, and their production in court is dispensed with.

"4th. That the defendants who have pleaded payment of bills, have the amount of bills stated in their pleas, and their production in court is dispensed with—but the time when they obtained them is subject to proof.

"5th. That the total circulation unredeemed by the bank, but including what has been redeemed by stockholders, is \$1,500,000 00; of which the sum of \$675,000 00 was paid out by the bank to the late Confederate government as a loan, and the sum of \$700,000 00 was in like manner paid out to the state of Georgia as a loan; all which loans were made between October 1st, 1861, and December 31st, 1862.

"6th. That the capital stock of the bank is \$500,000 00.

"7th. That the judgments against the Mechanics' Bank amount to \$97,483 00, all on bills. That there are in suit in the federal court, bills amounting to \$13,000 00, and in the city court of Augusta, bills to the amount of \$1,000 00. That there are now pending in Richmond superior court against said bank, on bills, the following suits: S. D. Heard, to the amount of \$38,025 00; William Dougherty, to the amount of \$22,181 00; Thomas P. Branch, to the amount of \$96,000 00; John P. Branch, to the amount of \$50,000 00.

"That all the above suits were commenced before January 1st, 1870; besides which were commenced the following before January 1st, 1870, and have since that time been dismissed for want of prosecution: W. L. High, (two suits,) for \$1,168 00; M. G. Dobbins, for \$200,000 00; W. M. & R. J. Lowry, for \$10,000 00; A. D. Cothran, for \$2,295 00; Daniel Miller & Company, for \$4,161 00; William Hazlehurst, for \$22,180 00. Besides which no suits against said bank are pending.

"8th. That said bank suspended specie payment in December, 1860, and has never since resumed payment; and since the close of the late war has kept no place for banking business, and has ceased ever since that time to do business as a

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bank; and that its bills have not circulated as money in ordinary business transactions since the war.

"9th. That plaintiff received his said bills since the war, and before the adoption of the present constitution, in the due course of business, and that he paid for them various prices varying from five to ten cents on the dollar.

"10th. That previous to the commencement of these suits against the several stockholders, plaintiff had obtained judgment on the bills sued on against the Mechanics' Bank, and that execution had issued thereon and had been returned by the sheriff of Richmond county, *nulla bona*."

It was shown by evidence on the part of defendant that he had redeemed, *bona fide*, by purchase at from six to twelve cents on the dollar, bills of said bank previously unredeemed, to the amount of \$95,802 00, of which the sum of \$68,802 were purchased before the 31st of December, 1869, and the remainder since the commencement of this suit.

The plaintiff's counsel requested the court to charge the jury:

1st. That under the charter of the Mechanics' Bank, the stockholders, by the terms of said charter, are not sureties and only liable ultimately, but that they are primary debtors with the bank, and primarily liable to the billholders.

2d. That it does not matter what the holders of the bills paid for them, they will not be restricted in their recovery to that price, but are entitled to the full amount expressed upon the face of the bills; that the price paid for the bills can by no means affect the recovery, and the mere fact that the bills in this case were bought at a low rate, to-wit: at five to ten cents on the dollar, would not affect the right of the plaintiff to the amount expressed upon the face of said bills.

3d. That a stockholder of the Mechanics' Bank cannot set up as a defense to a suit by a *bona fide* holder for value of notes of the bank, and who holds a judgment against said bank, the amount of the notes redeemed by him, but said plaintiff is entitled to recover the full value of the face of the notes which he holds.

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4th. That even if a stockholder might set off against the suit of a *bona fide* holder of the notes of the Mechanics' Bank, the amount of the notes of said bank redeemed by him, when it appears from the evidence that said stockholder bought said bills for less than the value expressed upon their faces, he will be restricted to the amount paid by him for said bills or notes.

5th. That each stockholder of the Mechanics' Bank is liable to the *bona fide* holder for value of the bills or notes of said bank, for the full value expressed on the face of said bills without reference to the amount of the bills of said bank, which said stockholder may hold, no matter how he became possessed of them.

6th. That the clause of constitution, section 17th, paragraph 2d, is void, being in conflict with the constitution of the United States, because it impairs the obligation of these contracts.

7th. That said clause does not embrace bank bills or notes.

8th. That the Confederate government was an organized government; and that it was, to a certain extent, a *de facto* government.

9th. That plaintiff is presumed to be a *bona fide* holder of the notes in his hands, and that the clause in said constitution of Georgia does not apply to said notes, unless he was a party to such illegal contracts mentioned in said clause.

10th. That said clause did not embrace notes issued before the rebellion, nor any notes, unless the jury find that they were made, or some of them, by either or both parties, with the intention and for the purpose of aiding and encouraging the rebellion, and so known to the other party; or first, that there was such illegal principal contract made during the rebellion; and then, second, that the notes sued on, or some of them, were executed at the same time, or since said principal illegal contract was made by said parties, or either of them, in connection therewith or as consideration therefor, or in furtherance of said principal contract.

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11th. That a re-issue of a bank note is not a making or execution thereof.

12th. That in this case, slight evidence is, if credible, sufficient to cast upon defendant the burden of proof of his defense by testimony in support of his plea; that the jury may look to the dates of the official connection of the different officers of said Mechanics' Bank, and their deaths, in considering the question as to when said bills were made or executed.

13th. That the mere circulation of said bills among private persons, for lawful purposes during the rebellion, was not and is not illegal.

14th. That although the bills sued on may have been issued during the war, for the purpose of aiding the rebellion, and on that account illegal, still, in the hands of a *bona fide* purchaser, for value, without notice, they will be upheld, and the holder will be entitled to recover.

Which charges the court refused to give, except the first and second. To which ruling the plaintiff excepted.

The court, at the request of the defendant's counsel, charged the jury :

1st. That under the constitution of the state, and the pleading in this case, the plaintiff cannot recover, unless he proves that the bills, which are the foundation of this suit, were not issued in aid of the rebellion against the United States.

2d. That in any event the plaintiff is only entitled to recover such a sum as bears the same proportion to the whole amount of bills in circulation, less the amount proved to have been issued to the Confederate and State governments in aid of the war against the United States, as the defendant's stock bears to the whole capital of the bank.

3d. That the plaintiff can only recover the proportion above stated of such bills of the bank as were sued on, on or before January 1, 1870.

4th. That if the defendant has redeemed as large a proportion of all the bills of the bank outstanding as his stock bears to all the stock of the bank, he is liable for no more of said bills.

To which charges the plaintiff excepted. The jury found a verdict for the defendant.

Error is assigned by the plaintiff upon each of the aforesaid grounds of exception. And defendant excepted to the rulings and decisions of the court as follows:

1st. Defendant requested the court to charge the jury, that if said bills are held to have been illegally issued, but it is held that plaintiff can recover, as a *bona fide* holder, he can only recover, as such, the price he paid for them with interest; which charge the court refused to give.

2d. Defendant requested the court to charge, that if defendant has redeemed the bills of said bank to the full amount for which he is liable under the charter, there can be no recovery against him; which the court refused to give so far as relates to bills purchased since the commencement of the suit.

Upon both of which exceptions error is assigned by the defendant.

HENRY W. HILLIARD; Z. D. HARRISON, for plaintiff in error in first case.

A. T. AKERMAN, for plaintiff in error in second case.

W. T. GOULD; W. H. HULL, for defendants in error in both cases.

WARNER, Chief Justice.

The Mechanics' Bank was chartered prior to the war, and authorized to issue bills to circulate as money. By the terms of its charter "the persons and property of the stockholders, for the time being in said bank, shall be pledged and bound in proportion to the amount of the shares that each individual or company may hold in said bank, for the ultimate redemption of the bills or notes issued by or from said bank during the time he, she or they may hold such stock, in the same manner as in common commercial cases, or simple cases

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of debt." When the stockholders accepted the charter of the bank it became a contract between them and the state, by which they were bound, in accordance with the terms thereof. The plaintiffs in the several suits now before the court are the billholders of the bank, suing on *that* contract, and are endeavoring to enforce the same. The pleas of the defendants do not allege *that contract* to have been illegal, because it was in aid of the rebellion, and if the several matters of defense set forth in the defendants' pleas are authorized by the seventeenth section of the fifth article, paragraph two of the constitution of 1868, the same is unconstitutional and void as to contracts made prior to the date thereof, because it impairs the obligation of the contract sued on by creating a defense to that contract, which did not exist when the contract was made, and otherwise invades the rights of the plaintiffs as to their remedy to *enforce* that contract, which did not exist at the time the contract was made. The pleas of the defendants and the evidence offered thereunder as to the illegality of the contract sued on by the plaintiffs, constituted no legal or valid defense thereto as against the plaintiffs, who are the holders of the bills of the bank issued in pursuance of its charter.

If the stockholders of the bank had redeemed bills of the bank prior to the commencement of the plaintiffs' suits, to the amount of their respective shares of stock therein, or a proportional part thereof, then such stockholders might plead such redemption of the bills of the bank in discharge of their liability as stockholders to the extent of such redemption of the bills of the bank by them, before the commencement of the plaintiffs' suits. The plaintiffs, as the billholders of the Mechanics' Bank, are entitled to recover from the stockholders thereof, in the proportion which the amount of the shares that each individual stockholder held in said bank bore to the indebtedness of said bank to the billholders thereof, at the time of the commencement of the respective suits against the bank and the stockholders therein, for the redemption of the bills issued by the bank in pursuance of the terms of its charter. In

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other words, whatever amount the bank was indebted to the billholders thereof at the time of the commencement of the plaintiffs' suits on their bills, the stockholders are liable to redeem the same, in proportion as their respective shares of stock in said bank bears to the indebtedness of the bank to the billholders thereof—that is the measure of their liability under the charter of the bank as accepted by them. In my judgment, the judgment of the court below should be reversed in each of the cases against the stockholders of the Mechanics' Bank, as well as that against the Mechanics' Bank.

Judgment reversed.

TRIPPE, Judge, concurred in the first case as follows :

1. Actions brought by the *bona fide* holders of bank bills which were issued by the bank payable to bearer, and which passed into circulation as money, cannot be controlled by the provisions of the second paragraph of the seventeenth section of article five, of the constitution of 1868, nor can the illegality of such issue by the bank, as contemplated in said provision, be set up as a defense against the right of such holder to a recovery.

2. If said provisions of the constitution were intended to apply to such cases, they are void under the tenth section of the first article of the federal constitution, inasmuch as they not only annul subsisting contracts which were otherwise legal and valid, but impose upon the holder of such bills impracticable conditions in cases of certain defenses, and which practically deny all right of recovery.

3. The measure of recovery by the owners of bank bills in an action against a stockholder in the Mechanics' Bank, is to be ascertained from the amount of outstanding bills of the bank at the time such action is brought, and such stockholder's liability therefor is in proportion to his share of stock in the bank, subject to be reduced by the amount of bills he has taken up before the commencement of the suit against him.

In the second case, as follows :

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I concur in the judgment rendered in this case on the grounds and for the reasons I give for the decision in the case of *Branch vs. Mechanics' Bank*, 52d Georgia Reports, 525.

McCAY, Judge, dissented in both cases.

ALBERT B. ROSS, administrator, *et al.*, plaintiffs in error, vs.
THE SOUTHWESTERN RAILROAD COMPANY *et al.*, defendants in error.

1. A bill was filed by an executor, under advice, praying for certain directions as to the rights of some of the legatees, and asking a decree for the disposition of the whole estate and his discharge as executor. Some of the legatees were minors, and the bill prayed the appointment of a guardian *ad litem* to represent them, if necessary, but farther set forth that the mother of the said minors was their guardian, appointed under the laws of the state of New York, where she and they resided. The bill was filed during the session of the November term, 1869, of Bibb superior court. During that term, all the parties at interest, who were adults, appeared. The mother, as guardian of the children, answered the bill. At the same term an order was taken by consent, that the cause be submitted during that term to a jury for a decree, which was done accordingly, and a verdict and judgment entered discharging the executor—decreeing that the adult legatees had been settled with, and that the assets on hand be turned over to the mother, as guardian of the minors, according to and under the laws of New York. Among the assets were certain shares of the Southwestern Railroad Company, standing on the books in the name of the executor. In pursuance of the judgment, the executor caused these shares to be transferred to the mother guardian :

Held, that whilst this decree was irregular and unwise, it was not void, and if had in good faith, without fraud, and with intent to protect the minors, persons acting under it or acquiring rights under it, without notice of the irregularity, will be protected.

2. Where minor orphans are in fact resident in any state, the proper courts of that state have *jurisdiction* to appoint guardians of their persons while there, and of any property they may have or acquire there, and this whether the legal domicile of said minors be in such state or not.
3. A foreign guardian, who, as such guardian, has belonging to the railroad stock of a railroad company in this state, may, if authorized to sell by the law of the state of his appointment, sell said stock and

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authorize its transfer upon the books of the corporation, without application to any of the courts of this state.

4. The title of the purchaser of stock in a railroad company is complete against everybody but the corporation, when the seller has given on the scrip, authority to the proper officer to transfer upon the books, and the purchaser has paid the price, and the presumption is at least *prima facie* that the price is paid when the authority to transfer is given, and the possession of the scrip is delivered.
5. When a bill of review was filed to review an irregular decree, in which certain assets had been decreed to be turned over to a foreign guardian, and a final decree on said bill of review, as to the parties served, was taken, in which the securities of said foreign guardian were made liable for the waste of a portion of the assets so turned over, the complainants in said bill of review, so far ratify the original decree as that they are estopped from saying that said foreign guardianship was void.
6. This case, both as to the law and the facts, having been by consent, submitted to the chancellor below, and there being no error of law, we are of the opinion that the evidence justifies his finding, and that his judgment ought to be affirmed.

Equity. Administrators and executors. Guardian and ward. Corporations. Railroads. Sales. Jurisdiction. Stock. New trial. Before Judge HILL. Bibb Superior Court. October Term, 1873.

Joseph Bond died in 1859, having, by his will, directed his executors and executrix, Thomas H. and William S. Moughon, and his wife, Henrietta S., to sell the whole of his estate, both real and personal, except such as he had given to his wife for life, and to invest the proceeds, when collected, in reliable dividend-paying bonds and stock, issued in the state of Georgia, for the benefit of his children, Maria L., Mary J., Lewis, Henry C., and after-born children. Henry C. died, and Joseph was born afterwards. He gave to his wife a life-estate in his dwelling-house and lots, his horses, carriages, household and kitchen furniture, and *stock* of every kind in the city of Macon; and his Colawahee plantation in Dougherty county, with all the stock, provisions and appurtenances on the same.

Bond, at the time of his death, owned fifty shares of the stock of the Macon Manufacturing Company, of \$100 00 each,

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and one hundred and twenty-four shares of stock of the Macon Gas Light Company, of \$25 00 each. Mrs. Bond claimed that this stock passed to her for life, under the will, as "stock" in Macon, and so it was ruled and decreed by the chancellor on her application.

The executors named qualified, sold the property as directed, and from the proceeds, when collected, among other things, invested, on the 7th January, 1861, in five hundred and thirty-six shares, and on the 18th June, 1861, in fifty other shares of the capital stock of the Southwestern Railroad Company, and had certificates or scrip for such stock issued to them as "T. H. and W. S. Moughon, executors, and Mrs. H. S. Bond, executrix, of the estate of Joseph Bond, deceased." And on the 4th March, 1864, W. S. Moughon, then the only acting executor, (Thomas H. having died, and Mrs. Bond married to Charles L. Nelson,) invested in fifteen other shares of the same company, taking certificate in his name as executor of the estate, making in all six hundred and one shares of Southwestern Railroad stock that he then held as such executor, for the benefit of Bond's children under his will.

Charles L. Nelson, in the latter part of 1865, or first of 1866, with his wife, who carried with her her three youngest children, to-wit: Mary J., Lewis and Joseph Bond, removed to and settled in the city of New York. In September of 1866, she visited Macon in the interest of her said three younger children, she and her oldest daughter, Maria L., who had intermarried with J. F. Nelson, having been fully settled with, and finding the executor having their whole estate in his hands, was dissipated in his habits, mismanaging and wasting the same, insolvent and largely indebted to the estate, after consultation with her attorneys, the Messrs. Nisbets, who were also the attorneys of the estate, as they had been of her husband at his death, filed a bill in equity against him, as such executor, in behalf of herself, her husband and her four children, for general account and settlement, also for injunction against further use, waste, sale, etc. This bill, being sanctioned, was abandoned on consultation with

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Moughon, and a new bill filed by him against Mrs. Nelson, as guardian of the three minor children, she having in the meantime been appointed their general guardian by the surrogate of the city, county and state of New York, also against herself and her husband, individually, her husband as administrator of J. F. Nelson, who was then dead, and Maria L., the other child. This bill was returnable to the October term, 1867, of Bibb superior court, then in session, service duly acknowledged by Charles L. Nelson, as the attorney in fact of Mrs. Nelson, and as guardian of the children of Maria L. and for himself, and as administrator. It was also answered by him, individually, and in his representative character, and by the Nisbets, as the attorneys of all the defendants. And on said bill so served and answered, a consent decree was rendered during the same term, whereby it was decreed that Mrs. Nelson and her oldest daughter had been fully settled with; that the entire balance of the estate in the hands of the executor, (saying nothing of that property in which Mrs. H. S. Nelson had a life-estate) consisting of the uncollected promissory notes for sale of property, amounting to about \$100,000 00, a note on F. K. Wright for principal sum of about \$15,000 00, secured by a mortgage on the Royston place, a large and valuable plantation in Dougherty county; stocks and bonds, the results of investments by the executors, amounting to upwards of \$150,000 00, including the six hundred and one shares of the capital stock of the Southwestern Railroad Company, were the property of the three minor children, Mary J., Lewis and Joseph Bond, and that the executors should turn them over to the Messrs. Nisbets, to pay fees and expenses of that proceeding; a debt due I. C. Plant, for testator's monument, and then to Henrietta S. Nelson, as guardian for her said wards. In addition to this, William S. Moughon, the executor, independently of what he may have wasted of the estate, was indebted to the estate by note, in the sum of \$124,000 00, for purchases at the executor's sale of negroes and other property. This note he was utterly unable to pay, but being possessed of a large and val-

uable plantation in Dougherty county, known as the Mud Creek place, with twenty-five mules thereon, he proposed to surrender that plantation and mules, which was about all the unincumbered property that he owned, in payment and discharge of his debt to the estate, and it was decreed, that the Mud Creek place and the mules go to Mrs. Nelson, as guardian of these three wards.

This decree was fully executed, and all the property, bonds and stock, except the uncollected promissory notes, turned over and fully transferred to Mrs. Nelson, as such guardian.

Colonel R. K. Hines, of Dougherty county, was then appointed special guardian for that county, for these three children, to sell the Mud Creek plantation for their benefit, which he did by proper authority, on 6th December, 1869, to Benjamin H. Hill, at the price of \$29,750 00, one-half paid in cash, and Hill's non-negotiable note for the other half, given at twelve months from date. The cash received and note was paid over to the New York guardian, less expense of guardianship and sale. The six hundred and one shares of Southwestern railroad stock was transferred by W. S. Moughon, as executor on the 20th December, 1867, after decree, to Henrietta S. Nelson, guardian of Mary J., Lewis and Joseph Bond, and a new certificate of stock issued to her by that company for the same.

Mrs. Nelson, afterwards, in New York, sold this stock to Moses Taylor, president of the National City Bank of New York, and delivered to him the scrip therefor, indorsed as follows:

"I authorize T. M. Cunningham, Esq., cashier, or William M. Wadley, president, to transfer the within shares to Moses Taylor, president.

HENRIETTA S. NELSON,

"Guardian of Mary Jane, Lewis and Joseph Bond."

Cunningham was the cashier, and Mr. Wadley the president, of the Central Railroad Bank at Savannah, where the Southwestern Railroad kept a stock book for transfers of stock and payment of dividends for convenience of stockholders, and this

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was the usual authorization to the officers for the making of transfers on such books.

The company declining to allow the transfer on this showing, an order was procured by Mrs. Nelson, as guardian, from the supreme court of New York, authorizing the sale, and an order from the ordinary of Bibb, ratifying and approving said sale, also approved by Judge Cole, as chancellor and judge of the superior courts of the Macon Circuit and Bibb county. The company still refusing to allow the transfer made on its books, Mrs. Nelson applied by bill in equity to the superior court of Bibb, against the Southwestern Railroad to compel that company to make the transfer. This bill being dismissed on demurrer, Moses Taylor, president of the National City Bank of New York, the purchaser, filed his bill to the same court against the same company to compel the transfer, his counsel being the Messrs. Nisbets, who were employed for him by W. B. Johnston. After the transfers were effected, the Central Railroad paid their fee for this service. In the body of the bill, Moses Taylor is stated to be the complainant; this was from inadvertence of the pleader, as the bill was backed as in favor of Taylor, as president. The defendant so answered and so the decree was taken, it being well understood on all hands that the bank, and not Taylor, individually, was the purchaser.

This bill being served and answered, came on for trial, and after solemn argument and full consideration, the court decreed and so directed that the transfer should be made, and it was done accordingly, and Moses Taylor, president of said bank, in the meantime having sold said stock to the Central Railroad, he immediately transferred the whole stock to that company.

In December, 1860, Mary J., the oldest of the three children, intermarried with James W. Lockett. And in April, 1870, said Lockett and wife sued out an attachment against said Henrietta S. Nelson, as guardian of said Mary Jane, and her husband, Charles L., which was levied on the house and lots in Macon, the gas and manufacturing stock, the Col-

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awahee plantation in Dougherty county, in which Mrs. Nelson had a life-estate, and Hill and Hines & Hobbs were garnished. The sum claimed by Lockett and wife was \$50,000 00, as due on account of his said wife, Mary. The same property had been attached by other creditors as the property of Charles L. Nelson, to satisfy his debts. Mrs. Nelson now came forward and filed her bill in equity to enjoin all these attachments, setting up an equal interest for satisfaction in the property attached on the part of the two minor children, and asked that their rights be protected as well as those of Lockett and wife. She also set up her separate title to the property as against her husband and his creditors; also that the house and lots in Macon had been sold by order of the court, in New York, and that Maria L., her oldest daughter, was the purchaser, not only of her life interest, but of the remaining interest of the children.

Lockett and wife only answered this bill, and in connection with that filed a cross-bill against Mrs. Nelson and her husband, the gas-light and manufacturing companies, Benjamin H. Hill, the Central Railroad and Banking Company, the Southwestern Railroad Company, Maria L. Nelson, Lanier & Anderson, and Lewis and Joseph Bond, minors, and a great many others, but those named were the only persons served.

The bill asked to review and reverse the decree rendered at October term, 1867, on the complaint of William S. Moughon, executor, so far as the same affected them injuriously, to-wit: in so far as it recognized Mrs. Nelson as the guardian of the minor children of Joseph Bond, and directed their property to be turned over to her; as it directed the six hundred and one shares of Southwestern Railroad stock to be transferred to Mrs. Henrietta S. Nelson, as guardian, and as it declared the gas stock and manufacturing company stock to have passed to Mrs. Bond for life by her husband's will. It maintained that the sale of the house and lots to Maria L. Nelson was void, and asked to have the same so declared. It claimed that the sale of the Mud Creek place to Benjamin H. Hill was illegal and void, and asked to have that so declared;

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that the several decrees and transfers under the same of the six hundred and one shares of Southwestern Railroad stock were all inoperative and void as to the minor children, and asked to have the same so declared. It asked that Henrietta S. Nelson, as guardian, and Charles L. Nelson, and Maria L. Nelson, her sureties, should account for all that came to her hands, including the six hundred and one shares of the Southwestern Railroad in case the transfers thereof were held to be good, and that the Nisbets be restrained from delivering to Maria L. Nelson the notes or proceeds thereof, which she claimed as *bona fide* purchaser.

James T. Nisbet was appointed guardian *ad litem* of Lewis and Joseph Bond. Maria L. Nelson answered this bill, insisting that her title was good to the real estate and notes.

While these proceedings were pending, letters of administration were issued to Albert B. Ross, the clerk of Bibb county superior court, as administrator of Joseph Bond, deceased, and a bill was, on the 25th March, 1871, filed in Bibb superior court, returnable to the April term ensuing, on the complaint of said Ross, as such administrator, James W. Lockett and his wife, Mary Jane, and by said Lockett as the next friend of Lewis and Joseph Bond, minors, against the Central Railroad and Banking Company, and the Southwestern Railroad Company, in which it was complained that the decree of October term, 1867, on complaint of William S. Moughon, executor, against Henrietta S. Nelson, guardian, and others, was "absolutely void so far as it affected the rights of complainants," that all transfers made under it were void; that the act of the Southwestern Railroad in permitting the transfer of the six hundred and one shares on its books, was fraudulent and illegal; that no valid transfer thereof had been made, but the title thereto was still in the estate of Joseph Bond. That the Central Railroad purchased said stock with full notice of complainants' rights. The bill asked that the certificates of said stock should be canceled and new scrip issued to the administrator of Bond, and that the dividends

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since the illegal transfer to Mrs. Nelson should be paid to him, with interest.

James T. Nisbet, as the guardian *ad litem* of Lewis and Joseph Bond, answered both bills, Mrs. Nelson's and Lockett's, in one answer, in which he informs the court that he had been notified by Lewis and Joseph Bond, one nearly of age, and the other a well educated and intelligent lad of fourteen or fifteen, in a paper submitted from their residence with their mother in Kentucky, that they were content with their present guardian, the said Henrietta S. Nelson, and desired her to remain in possession and control of any and all property belonging to them.

At the October adjourned term, for the year 1871, and on the 12th day of January, 1872, a final and absolute decree as to all the matters embraced therein was rendered in the original bill of Henrietta S. Nelson in her own right, and as guardian of Mary J., Lewis and Joseph Bond, against Maria Nelson, Lockett and wife *et al.*, and also of the cross-bill of Lockett and wife vs. Mrs. Nelson *et al.*, in which, following the decree of October term, 1867, it was decreed that all the property belonged to the three minor children. L. N. Whittle and James T. Nisbet were appointed commissioners to receive the Bond residence and lots in Macon, consisting of thirteen or fourteen acres, the White Hill place, described in the will of Bond as the Colawahee place, and the note and mortgage to secure it on the Mud Creek place, given by B. H. Hill for its purchase, on which was due over \$15,000 00. In the two first Mrs. Nelson had a life-estate, and the last was acquired exclusively under the decree of October, 1867. Again, the note and mortgage on F. K. Wright for the Royston place, on which was due over \$15,000 00, which the commissioners subsequently foreclosed, sold out and purchased under the said decree for the benefit of these three minor children, and now hold the same as their property, all the notes and judgments and moneys collected on them, in the hands of Messrs. Nisbets under the decree of October, 1867, and all the gas and manufacturing stock with accrued dividends on the same and

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rents on the dwelling-house. The commissioners were directed by this decree to reduce the same to cash by sale, as they thought proper, and to report to that court, the fees of Lockett and wife and Joseph and Lewis Bond to be taxed by the court and paid out of that fund; the Hoyt & Gardner debt being settled out of the rents of the Colawahee place; the balance on the judgment of Pointer Brothers against Charles L. Nelson, to be paid by the commissioners out of the assets and reimbursed out of any money that might be reached of C. L. Nelson's property by that proceeding; the commissioners to keep separate accounts of moneys received by them from the property of Henrietta S., which was a life-estate in Colawahee and in the gas and manufacturing stock; of Maria Nelson, which was the mansion house and lots in Macon, the notes, bonds and judgments in the hands of the Messrs. Nisbets; Nelson's property being his interest in Sandford's estate and in notes on Vason & Mallory.

The cross and original bill were retained in court for a final hearing, "when the several matters and things touching the estate of Joseph Bond, deceased, and the guardianship of Mrs. Nelson for her three youngest, which are not included and covered by this decree, viz.: the stock of the Southwestern Railroad and the dividends thereon claimed to have been sold and transferred to Moses Taylor, Esq., in New York, the assets and property in the hands of Mrs. Nelson, as guardian, and all other property not in this decree embraced, in which further and final decree a full and final settlement and accounting shall be had and taken between said Mrs. Nelson, as guardian as aforesaid, and said three younger children of Joseph Bond, deceased, when they three shall be made equal, and when Mrs. H. S. Nelson be allowed the proper credits for the value of her life-estate in the White Hill place and the gas and manufacturing stock, all of which shall be settled in said further and final decree." This decree was against the guardian and the sureties on her bond.

The commissioners sold the Macon real estate and stock, realizing some \$60,000 00; collected largely on the notes and

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judgments, sold out the White Hill and Royston places, and bought them in for the three younger children, and are now receiving annual rents for both places.

This decree absolutely settled and disposed of all the matters in litigation in the first original and cross-bill, with the exception of the Southwestern Railroad stock, leaving nothing to be adjudicated but the question whether that stock had passed out of the estate of Bond and the children of the testator, by the transfers and decrees before stated, and this question was taken out of these proceedings by the subsequent bill in favor of Ross, administrator, and others, against the Central and Southwestern Railroad Companies.

After this decree the Central and Southwestern Railroad Companies put in their separate answers to the Ross bill, in which they pleaded that the transfer by William S. Moughon, as executor, of the stock to Mrs. Nelson, as guardian of Mary J., Lewis and Joseph, passed the stock out of the estate to her, as guardian of these children, and that her transfer to Moses Taylor, president, etc., passed the title to him, and out of the estate and these children. The decree of October, 1867, and in favor of Moses Taylor, president, and transfers under the same, were all pleaded in bar of these proceedings. By an amended answer, an adoption, ratification and confirmation of the decree of October, 1867, was pleaded and set up, in suing out the attachment, and by the decree taken and rendered under the bill and cross-bill in January, 1872, and by the benefits which were acquired under these proceedings, all of which they had accepted.

The court to whom all questions of law and fact were submitted, decreed in favor of the defendants. The complainants moved for a new trial upon the following grounds, to-wit:

1st. Because the same is contrary to law and evidence.

2d. Because the court erred in holding and decreeing that the Southwestern Railroad Company, in transferring the six hundred and one shares of stock in dispute, were not charged with notice of the contents of the will of Joseph Bond, deceased, and were bound to take notice of nothing beyond what

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was stated in their books, and contained in the scrip issued for said stock, to-wit: that it was standing in the name of the executors of Joseph Bond.

3d. Because the court erred in holding that the second marriage of Henrietta S. Bond, and her removal to New York, and carrying along with her the minor children, the children of the said Joseph Bond, deceased, was a change of the domicile of said minors in law as well as in fact.

4th. Because the court erred in holding that at the time of the removal of the minor children of said Joseph, they had no acting testamentary guardian resident in this State, preventing their domicile from following that of their mother, and in holding and deciding that the purchase of the six hundred and one shares of Southwestern Railroad stock was not an investment under the third item of the will of Joseph Bond for the benefit of his minor children, but was simply a purchase by the executors.

5th. Because the court erred in finding and decreeing that the Southwestern Railroad Company made the transfer of said six hundred and one shares of stock to said Moses Taylor, president, as aforesaid, in good faith, under the several orders of the supreme court of the city and county of New York, the court of ordinary of Bibb county, Georgia, under the decree of the superior court of said last mentioned county, had and rendered on a bill filed by said Moses Taylor, president, as aforesaid, against said Southwestern Railroad Company for the purpose of authorizing and enforcing such transfer, and in holding that these were all necessary parties to such bill to protect said Southwestern Railroad Company from all damages to complainants for permitting such transfer.

6th. Because the court erred in holding and decreeing that William S. Moughon, as surviving executor of Joseph Bond, deceased, had full and ample authority to transfer said stock to Henrietta S. Nelson, as guardian of complainants, so far as such transfer can be made to affect the rights and liabilities of said Southwestern Railroad Company for permitting the same to be done, either with or without the decree of the court ren-

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dered on the bill for direction filed by said Moughon as executor of Bond.

7th. Because the court erred in holding and decreeing that while the proceedings under the bill filed by Moughon, as executor, were irregular, and that the court before which said case was tried, did not get proper jurisdiction of the minors by reason of its failure to appoint a guardian *ad litem* to represent them, yet, that the decree rendered therein did, as between said Moughon, executor, and the Southwestern Railroad Company, justify said railroad company in permitting the transfer of the stock upon their books to Henrietta S. Nelson, as guardian, by said Moughon, executor.

8th. Because the court erred in holding and decreeing that the complainants were estopped and barred by their action in suing out an attachment against Mrs. Henrietta S. Nelson, guardian, and Charles L. Nelson, and filing a declaration in attachment thereon, and by their cross-bill to the bill filed by said Mrs. Henrietta S. Nelson and others, to enjoin said attachment, and for other purposes therein set forth, and by the various actions and proceedings under said attachment, and said bill and cross-bill, and by the interlocutory decree had upon said bill and cross-bill, from prosecuting this cause against said defendants, the Southwestern Railroad Company, and the Central Railroad and Banking Company, and from recovering said stock and dividends or holding them liable for the transfer thereof.

9th. Because the Court erred in holding that said decree referred to in the preceding ground of this motion is a ratification and confirmation of said previous decree and proceedings of said Henrietta S. Nelson in her appointment as guardian, and as to the jurisdiction of said Court rendering said decree over said minors, and that said decree as to the transfer of the six hundred and one shares of stock of said Southwestern Railroad by said Moughon, executor, to said Henrietta S. Nelson, guardian of said minors, was thereby made valid and binding on each and all of said minors.

10th. Because the court erred in finding and decreeing that

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the Southwestern Railroad Company is not liable to complainants for said stock or the dividends thereon.

11th. Because the court erred in finding that the Central Railroad and Banking Company is the *bona fide* owner and holder of said stock, and is not liable to account to complainants for the same or for the dividends thereof.

The motion was overruled and complainants excepted.

WHITTLE & GUSTIN ; POE, HALL & LOFTIN ; B. H. HILL & SON, for plaintiffs in error.

R. F. LYON ; JACKSON, LAWTON & BASINGER, for defendants in error.

McCAY, Judge.

To say that the decree taken in 1869, is a void decree, simply because no formal order was taken making Mrs Nelson, the mother of these plaintiffs, their guardian *ad litem*, notwithstanding the whole proceeding was in good faith, is to pass a very harsh and technical judgment. It must be remembered that the litigation was commenced by a bill filed in the name of the minors, by Mr. and Mrs. Nelson, as *their next friends*, and on this bill an injunction was granted. Before any final action was taken on this bill, the executor filed a bill for direction, etc., asking that guardians *ad litem* should be appointed for the minors, if the court should think it necessary. Service was acknowledged by Mrs. Nelson as the guardian of the children, appointed by the New York court, and the court made no formal appointment of a guardian *ad litem*. We are not prepared to say that a decree taken against an infant, under such circumstances, is *ipso facto*, void. By the chancery practice in England, an infant may be sued and, ordinarily, must be served. But it has been held that the service may be on the parent: *Smith vs. Marshall*, 2 Atk., 70. The appointment of a guardian *ad litem* is not necessary to give the court jurisdiction, to entertain the suit. As to infants, Mr. Daniel says: "There are individuals,

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who, though they *may be sued* alone upon the record, yet, are incapable from want of maturity or weakness of their intellectual faculties, of conducting their own defense, and must, therefore, apply for and obtain the assistance of others to do it for them:" Daniel's Chan. Prac., 174, 1 vol. The failure to appoint a guardian *ad litem*, in a regular chancery suit, would seem, therefore, rather an irregularity than a defect, like want of service. It appears from the evidence; indeed, it is not denied, that the whole proceeding was not only in the very best of faith, but to the advantage of the minors. What evil has come, has been the effect of subsequent action, and had this decree not been taken, it is probable the effects would have been lost by the waste of the executor. It is clear that the infant's rights were defended, counsel employed of high character, that a guardian did appear, that such guardian was, in fact, recognized by the court, and that the object of the whole proceeding, (though in form, the minors were defendants,) was to protect their estate by getting it out of the hands of an insolvent executor, who had already wasted much of it. The court, who was, by consent, made the judge of both the law and the facts, has, in terms, found the proceedings complained of, to have been instituted in good faith, and to have been for the benefit of the minors, and this finding is, in our judgment, supported by the evidence. But we agree with Judge HILL in his holding that the proceedings under the bill of Mrs. Nelson, filed in August, 1870, to which these plaintiffs, as well as all other parties at interest, were parties, and fully represented, ratified the decree of November, 1867, under which Mrs. Nelson got the control of this stock. The bill filed in that case expressly prayed a review of the decree of November, 1867. The decree, under the bill of 1870, ratifies the decree of 1867. It treats the property got by the decree of 1867 as the property of the minors in the hands of Mrs. Nelson, as their guardian, and charges her securities for the waste of it. Can the plaintiff be permitted to treat a foreign guardian as such for one purpose, and repudiate her as such for another purpose? Surely these securities on her

New York guardianship, cannot be legally charged with her receipt of property under this decree of 1867, if she did not; under the law, have a right to get that possession. Nor was it competent, in our opinion, for the plaintiffs to thus ratify the decree of 1867, and then reserve the right to go on those defendants, with the privilege of repudiating the guardianship of Mrs. Nelson in this suit. There was in this cross-bill of 1870, a special prayer for a review of the decree of 1867, and Moughon, the complainant in the bill of 1867, was made a party to the cross-bill. The whole case, including the cross-bill, went to trial in 1871, without any service or appearance by Moughon, and the decree, without any reservation, of the review, treats Mrs. Nelson and her securities as guardians, and liable for what she received and got possession of under the decree in the bill filed by Moughon. It seems to us that this was not a setting aside of the decree of 1867, but an abandonment of the prayer for review. The decree of 1867, was on Moughon's bill for direction and for leave to settle up the estate in a particular way. The decree on the bill and cross-bill of 1870, accepts much of this 1867 decree as to be accounted for by Mrs. Nelson and her sureties, and charges the property of the security in this state for her waste of it. And whilst there is a reservation, as against Mrs. Nelson, of the right to charge her in the future with the railroad stock, there is no reservation of the right to review the decree of 1869. Nor is it clear that in this reservation anything else was intended to be reserved, but the liability of Mrs. Nelson, as guardian, to account for the Southwestern Railroad stock. There is no express reservation of any right to ask a decree against Taylor or either of the railroad companies, and if it be considered that in the decree that was taken, Mrs. Nelson is treated as the guardian of the minors, and her securities as such guardian, charged with her default, it is saying a good deal, to insist that it was the intent of this reservation to hold up the right to follow this stock, as a specific thing, into the hands of the defendants, Taylor and the Central Railroad Company. Whatever may

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be the rule as to the power of a widow who has married again, to change the residence of her first husband's children, so as to affect any of their legal rights to property, or of inheritance, the fact is undisputed that the actual residence of these was changed, and that their persons were in the state of New York. It seems to us that if the persons of minors are in a jurisdiction there is a right and duty, in the courts of that jurisdiction, to appoint a guardian over their persons and any property they may have there. The appointment does not clothe the guardian with any authority extra-territorial. But it is not a void appointment, it is good for acts done in the jurisdiction, as to *property actually there*. As to this stock a simple statement of the facts is: It stood on the books of the Southwestern Railroad Company, in the name of Bond's executors. Under the power given Mrs. Nelson, as guardian, by the decree of 1867, it was transferred on those books to her, was by her sold, as guardian, in New York, under the laws of New York, to Moses Taylor, who paid her for it, and who had no notice of any irregularity, or any defect of the title of Mrs. Nelson, as such New York guardian. The transfer of the stock on the books, was by Moughon, as executor, to Mrs. Nelson, as guardian of these minors. Mr. Taylor had no *actual* notice at the time of his purchase, of even any irregularity in the decree of 1867, nor did he have any actual notice from whence Mrs. Nelson, the guardian, obtained the stock. It is contended that he is charged with notice by the books of the corporation; that these books showed the stock had stood in the name of Bond's executors, and were transferred to Mrs. Nelson, guardian of Bond's children, and that these facts charged him with notice of Bond's will, and of the decree of 1867, and that he had these for constructive notice of all the plaintiffs' claim. As we have said, we do not think the decree of 1867 void. It was had before a court having jurisdiction of the subject matter, and certainly of some of the defendants. The plaintiffs to this suit were parties to the bill of 1867. Their mother appeared by acknowledgment of service, as their guardian, and by eminent counsel. The

only defect so far as the parties are concerned, was that no formal order was passed appointing a guardian *ad litem*. A guardian did appear, the court recognized that guardian, and throughout the whole proceedings the rights of the infants were taken care of. If there was a fault of the court by which the guardian was permitted to get possession, without security, that was not a fault which affected the jurisdiction and would not vitiate the title of Mr. Taylor, admitting that he is charged with notice of the decree. Put the case as though he had seen the decree: He finds, 1st, a bill filed in the name of these minors, by their next friend and mother, Mrs. Nelson, and others, against Moughon, asking an injunction and praying a distribution; he finds that injunction granted. Nothing appears in the *record* disposing of that bill except the proceeding on the second bill. 2d. He finds the bill filed by Moughon, an acknowledgement of service by Mrs. Nelson, as guardian, and finds her recognized as such by the court in its decree, and the stock ordered to be turned over to her as such guardian. In our judgment, had he seen all this it would not invalidate his purchase. The decree was not void, and a purchaser charged with notice of it, may be nevertheless an innocent purchaser. Nothing unfair appears; in fact, the proceedings show, as well as the evidence produced on the present trial, that the decree was for the benefit of the minors. The loss has not come from the decree, but from the mistake of the judge in permitting Mrs. Nelson to take the property without security. Nor are we prepared to say that what appeared on the books of the railroad company was constructive notice to Taylor that Moughon had no right to transfer to the guardian. Nothing on the books showed by what authority Mrs. Nelson was authorized to receive it. That the stock stood in the name of Moughon, as executor, might, perhaps, put a purchaser on notice to examine the will. But that will clearly leaves the investment with the executor. The stocks are to be *safe*, and it would be the undoubted right and duty of the executor to keep them safe. This case is not like the case of *Nutting et al. vs. Thomason et al.*, 46th Georgia, 34.

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There the stock stood in the name of the deceased. Here it stood in the name of the executor. The purchaser from Mrs. Nelson could only be bound to inquire into the authority of Moughon to transfer; certainly he cannot be held to inquire whether the transfer was a wise one. How could he know that this was not a sale to Mrs. Nelson, and that the executor had sought a safer investment? As against everybody except the railroad company, the title to the stock passed by the sale to and payment by Taylor. Such is, we believe, the well established rule. The sale and transfer of the stock, with an order to transfer it, passes the title; the transfer on the books is only to protect the company who may have liens upon it: Angell & Ames on Corp., 568, 571. If Taylor, then, was an innocent purchaser at the time he bought and paid his money, no subsequent notice, either to him or his vendees, could affect his or their rights. Stocks in railroads are personal property, (see Code section 233,) and if legally sold by a foreign guardian, according to the laws of the state of the guardianship, and the possession thereof is transferred, the title is passed. Our act of March 6th, 1856, recognizes the right of sale and transfer by a foreign guardian, and there is nothing in the Code inconsistent therewith. Upon the whole, whilst it is a sad thing that this fine estate has been so largely squandered, yet, courts are bound to see to it that innocent purchasers be also protected and whilst it would give us great pleasure to see these children fully in possession of their father's bounty, we do not feel that the rules of law justify us in reversing the decree of the judge below, whose full finding forms a part of the record.

Judgment affirmed.

JASPER F. GREER, administrator, plaintiff in error *vs.* JOHN F. COURSON *et al.*, defendants in error.

The bill in this case is not multifarious.

Equity. Multifariousness. Before Judge BARTLETT. Jones Superior Court. April Term, 1874.

For the facts of this case, see the opinion.

LYON & IRVIN, for plaintiff in error.

J. RUTHERFORD, for defendants.

TRIPPE, Judge.

Mrs. Sarah Townshend conveyed by deed, in February, 1871, certain land to her son, Dennis L. Townshend. Afterwards, in the same month, she made a deed of all her personal property to Jasper F. Greer, as trustee for the children of her deceased son, T. J. Townshend, and of her deceased daughter, Eliza E. Courson. A question is made in this case upon this last instrument—whether it is not a testamentary paper, which will be noticed hereafter. In January, 1872, Mrs. Townshend executed another deed, with warranty, to one-half the land conveyed in the first deed—to the wife and children of John T. Courson, who is one of Mrs. Eliza Courson's children. Mrs. Townshend died intestate in April, 1872, leaving no other property, and Dennis L. died in July thereafter. Greer, the plaintiff in error, and who is mentioned in the second instrument as trustee, took administration on the estates both of Mrs. Townshend and of Dennis L. John F. Courson and wife were in possession of the land mentioned in the deed to his wife and children. Greer, as administrator of Dennis L., filed a bill in October, 1872, against Courson and wife to get possession of the land, and to cancel the deed made to the wife and children, and asking for an injunction, and also as administrator of Mrs. T. and as trustee aforesaid, against all the heirs-at-law of Mrs. Townshend, and the beneficiaries under the deed of trust—setting up that it was claimed that said deed was only testamentary and void, and if so, that the property therein mentioned became assets of Mrs. T.'s estate, and praying for a construction of said instrument, and directions as to

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his duty in the premises. This bill was sanctioned by the chancellor, and the injunction granted, with an order that the land conveyed in the deed of January, 1872, be surrendered to the administrator of Dennis L. Townshend. No demurrer was filed to this bill, or exceptions taken to the order. John F. Courson then sued Greer for his share of the property contained in the Greer deed, and also brought suit for the use of J. Rutherford, on an order drawn by him on Greer in Rutherford's favor, for part of his interest in said property, and which order was never accepted by Greer. Mrs. Courson (wife of John F. Courson) and children also sued Greer as administrator of Mrs. Townshend, on a breach of the warranty in their deed of January, 1872, alleging that the previous deed to the said Dennis L., was a valid subsisting encumbrance on the land, and constituted a breach of the covenant contained in their deed. Greer then amended his original bill by praying an injunction against these suits, and setting up, among other things, that if the paper called a trust deed, was in fact such, there were no assets to meet the suit for a breach of covenant, and that John F. Courson, the husband and father of the plaintiffs in that action, was claiming by his said action, an interest under that deed. At the October term, 1873, John F. Courson, and his wife and children, severally demurred to the amended bill, on the ground of multifariousness. At the April term, 1874, both demurrers were sustained.

We think that when the case had reached the state it was in, and after the various suits set out were instituted against complainant, he was entitled to his bill, and it was not multifarious. In the question, as to whether the paper called a trust deed is testamentary and void, (for it has but two witnesses,) all the heirs or distributees of Mrs. Townshend are interested and are proper parties—for if it is void, they take the property. Dennis L. Townshend is one of these, and, therefore, Greer, as his administrator, properly introduces himself as a party. John F. Courson is a direct beneficiary under that paper, is suing under it, and of course, should be a

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party. Mrs. John F. Courson and children are properly parties, for complainant has a right to ask that their action be enjoined until the question as to whether certain property in his hands is assets of the estate of Mrs. Townshend, to be administered as such by him, or is the property of the beneficiaries in the trust deed is determined. If it be the former, then the administrator might be able to respond to a recovery in their action of covenant. If it be the latter, there would be no assets. As the case stands, he cannot plead with safety to the action at law. The terms of the trust deed are such that the administrator and trustee has the right to get the proper construction of it by the court. And as he is one and the same person, the bill may be said to be in the nature of a bill of interpleader.

If any difficulty on the part of multifariousness could grow out of the question raised in the original bill as to vacating the deed to Mrs. J. F. Courson and children, and recovering the land therein mentioned, that seems to be removed by the subsequent proceedings. Mrs. Courson and children have resorted to the covenant in their deed, and set up as a ground for their right to recover the *validity of the deed to Dennis L. Townshend*. The question, then, as to the right of Greer, as administrator of Dennis, to have the deed to Mrs. Courson and children canceled, seems not to be any longer in the case, and does not arise in considering the demurrer.

Judgment reversed.

THE SOUTHERN LIFE INSURANCE COMPANY, plaintiff in error, *vs.* MARY V. WILKINSON *et al.*, defendants in error.

1. Where suit is brought by a widow and child on a life policy, insuring the life of the husband and father, and the plaintiffs are the joint beneficiaries under the policy, the admissions of the widow are competent evidence for the defendant on the question of misrepresentation made in the application for insurance.
2. The rule that a witness, who is not an expert, must give the facts on which he rests his opinion before he will be allowed to state what that

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opinion is, applies to one who is not a physician, and by whom it is proposed to prove the condition of the health of a party.

3. The grounds on which the court refused to withdraw the testimony of the witnesses, Sasser and Willis, cannot exist at any future trial of the case, and as the objection may be cured in time hereafter it is not necessary to consider these exceptions further.
4. The same may be said as to the defective notice to produce the family bible. Such defect may be cured by another notice. We do not think the court erred in holding that a notice to produce the "father's family bible," would not force the production of the one described by the witness in this case.
5. But a bible containing a family record, in the handwriting of a deceased daughter, which remained in the possession of the mother until her death, and then went into the possession of another daughter, from whom the witness (a son) got it, is competent evidence on the question of the age of one of the children of that mother. The fact that the witness states that he did not acknowledge the record as correct, and that his mother said it was copied by a sister of witness, and it was not considered correct by the family, does not render the record incompetent as testimony. Such statements of the witness may be considered by the jury in determining the weight to be given to the record, and it is subject to be weakened or strengthened by all the evidence in reference to it.
6. It was not error for the court to refuse to charge the jury that a delay for several months to give notice of the death of the party whose life was insured was a failure to give notice in a reasonable time.
7. Nor was it error to charge the jury that "in considering the question as to the false or fraudulent statement made by the insured, you may consider, if you shall think it throws light on the question, how and by whom the insurance was gotten up, whether at the instance of the insured or by the agent of the company." All the surrounding circumstances in all contracts where fraud is charged, are matters for the consideration of the jury which is to pass upon it.
8. Where evidence is introduced upon the point of misrepresentation as to the age of the party whose life is insured, which is competent, and is to be considered and weighed by the jury in determining the real age of the party, the court should not in its charge, by argument, weaken the weight of the evidence, and say that a portion of the testimony thus relied on does not prove what the party introducing it claims that it does show, and has a right so to argue, the more especially when that portion so pointed out has to be taken in connection with another part, in order to get its full force.
9. When the question put in the application is whether the applicant "ever had any serious illness, local disease, affection, or personal injury," it was not error for the court to charge, that the word "serious"

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qualified each of the words; "local disease," "affection" and "personal injury."

10. Under the provisions of the Code, applications for insurance must not only be made in the utmost good faith, but the representations contained therein are covenanted to be true by the applicant. Not that they are warranties so as to vacate the policy, if any of them, whether material or not, are not true; but any variation in them from what is true, whereby the *nature* or *extent* or *character* of the risk is changed, will, if the policy makes them the basis of the contract of assurance, void the policy, whether they are or are not wilfully and fraudulently made.

Insurance. Admissions. Evidence. Witness. Experts. Production of papers. Charge of Court. Warranty. Before Judge HILL. Bibb Superior Court. October Adjourned Term, 1873.

Defendants in error, the widow and son of the assured, declared, in an action of debt on a policy on the life of the husband and father for \$10,000 00. Plaintiff in error pleaded the general issue, and that the policy was null and void, in that deceased made misstatements as to his age, and also as to his health, stating that he was in good health and free from any symptoms of disease at the date of his application, and that he never had any serious illness, local disease, affection or personal injury, "except a slight case of pneumonia in January last," whereas he did have symptoms of disease and was not in good health at the date of the application, and had had liver disease, etc.

The policy contained this stipulation: "The statements and declarations of the assured, made in the application for this policy, and upon which it is issued, are hereby made a part of this contract of insurance, and if any of said statements or declarations be found untrue, the policy shall be null and void." It also reads: "In consideration of the representations made in the application for this policy, and of the sum of \$225 34, to them duly paid by Mary V. Wilkinson, etc., do issue," etc.

The application contains this stipulation: "It is hereby declared that the above are true and fair answers to the fore-

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going questions. And it is agreed by the undersigned that the above statements shall form the basis of the contract for assurance, and also that any untrue or fraudulent answers, or any suppression of facts in regard to the above named person's health, will render the policy null and void," etc.

The policy and application were in evidence, also a receipt of \$226 26, first annual payment.

Three letters from Dr. Mitchell, general agent, of date June 13th, and August 4th and 9th, 1870.

The first informs the company that he fears the policy is a bad risk and fraud was practiced, but would investigate further.

The second that he has investigated, and at the time of his application the risk was good; the rumors were originated in malice to deceased, and perhaps to the company; looked reasonable because he was so soon taken sick.

The third announces Wilkinson's death.

The oral evidence was as follows:

1st. J. T. Wilkinson, brother of deceased, and executor: Plaintiffs are wife and only child of deceased, who died 13th August, 1870; first saw policy in possession of plaintiff in fall of 1870; did not give it to him when she did the other papers, but afterwards did, to collect; applied to the company by letter, and they sent blank to Leman, agent, to prove death; saw his brother buried; witness had a bible which had record of birth in it; not his father's bible; record in handwriting of Mrs. Sandford, a half-sister; this bible was in possession of his mother till her death, then in that of his sister, Miss Wilkinson, from whom he got it and delivered it to Colonel Whittle, plaintiff's counsel, who now has it; his mother said it was copied by a half-sister of witness and was not considered correct by the family; witness has his mother's bible—Douay edition—and it has no record; has not his father's bible; never knew anything about it, if he ever had one; only knows his age from the record which they thought wrong, and which makes him fifty-four or fifty-five, which he

thinks about his age; was five or six years old when father died.

2d. Enoch C. Brown: Knew deceased several years before the war, and served three years in the army with him; messed with him, was sick a good deal, constantly took liver pills; knows this of his own knowledge, and from being told so by Wilkinson; he complained of ill health before, during and after the war, up to the time of his death; whenever they met he complained; met him frequently in Milford after the war; always heard him complain of affection of the liver and dyspepsia, from the time he first knew him up to his death; was very sick a short time before February, 1870, of severe pneumonia, and condition feeble in February, 1870; physicians prescribed medicine for dyspepsia for him, and he took it in witness' presence; witness was troubled with it himself.

3d. Dr. C. H. Paul: Knew deceased from 1839 until his death; attended him and treated him in early part of 1860 for pneumonia; afterwards, in the same year, for affection of the liver. Deceased told him before 1870, that he was taking Simmon's Liver Regulator and Profit's Liver Medicine. In 1869, as he remembers, deceased told him he was in bad health and didn't know what was the matter with him, and that he had been taking the patent medicines; did not then prescribe for him, but did, in 1870; his disease was hypertrophy and induration of the liver; visited him three or four times; treated him for that disease, and advised him to go up the country; been practicing medicine twenty years.

J. G. Sasser: General health good; saw him once to six and seven times a week; lived in a mile of him; don't think he could have had a *badly* diseased liver without witness' knowing it.

4th. A. L. Willis: Knew him intimately for four years; saw him two to four times a week; general health good; never knew him *permanently* ill of any disease; died in August, 1870, or latter part of July; about forty-three years old when he made application; signed certificate as his friend; true, to the best of his knowledge and belief.

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5th. J. L. Varner: Was traveling agent under Dr. Mitchell, general agent; called and solicited insurance from disease, as was usual in the business; canvassed Southwest Georgia; got over seventy-five policies; considered him in good health; good a subject as ever insured; answers made by deceased; witness believed them true, from his appearance of good health, and his character and reputation in neighborhood; sent company over \$3,000 00 insurance money that winter.

6th. Dr. George M. Willis: Is practicing physician; examined Wilkinson for company; policy fairly obtained on Wilkinson's part; had known Wilkinson two years; attended him in January, 1870, for attack of pneumonia; was convalescing from it on 18th February, 1870, when application was made; too feeble to do hard work; not entirely well, but out of danger; said he did not think his application would be received; got medicine from witness in May to act on his liver; but, from his own examination, and never having heard of any physician pronouncing his liver diseased before 18th February, thinks it was, at that time, sound.

7th. Thomas Farrow: Knew Wilkinson four years before his death; was informed that he enjoyed good health till latter part of 1870 or first of 1871; understood he had pneumonia, which ran into consumption or liver disease—don't know which.

The jury found for defendants in error, \$10,000 00, with interest from 10th of April, 1871.

Plaintiff in error moved for a new trial upon the following grounds, to-wit:

1st. Because the court erred in ruling out the evidence of James W. Warren, that he "had a conversation with Mary V. Wilkinson, plaintiff, in the summer of 1871, in reference to a policy of insurance upon the life of her husband, issued by the Southern Life Insurance Company." In that conversation she said that her husband "had liver disease at the time of his application for said policy, and had suffered with it for a long time previous thereto, and that he expressed the belief that his application would be rejected by the company," upon

the ground that "where there are several parties with no joint interest, the admissions of one cannot be received, unless the issue is of such a character that the effect of the admission can be restrained to him alone."

2d. Because the Court erred in ruling out the following testimony of Enoch C. Brown in answer to second interrogatory, "when he was a young man he appeared healthy, but when he matured in life his diseased condition developed;" also in answer to the third interrogatory—"I was sick myself, and was told my liver was affected; his symptoms were like mine, and the same kind of medicine was taken by us."

3d. Because the Court erred in admitting the following testimony of J. G. Sasser which was in reply to the second cross-interrogatory, as follows: "Can you say, of your own knowledge, that W. W. Wilkinson was a healthy, sound man in 1870, or at any time during the time you knew him?" "Do you not know that respectable physicians pronounced him unsound in 1870 and 1871? Could he not have been diseased of the liver without you knowing it?" Answer: "To the best of my knowledge and belief he was, up to his last fatal illness, except a light attack of pneumonia in January or February, 1870. I do not know of any respectable physician pronouncing him unsound before his last illness. I don't think he could have had a badly diseased liver without my knowing it and hearing some complaint." Also, in admitting to the jury, the reply to the third direct interrogatory, which was: "What was the general health of Wilkinson? Did you ever hear of his being permanently ill of any disease?" Answer: "His general health was good. I never did before a short time before he died."

4th. Because the Court erred in admitting to the jury the following evidence of A. L. Willis, as follows: "I do not think a man of his complexion could have had a badly diseased liver without my detecting it in his looks, or hearing him complain in some way."

5th. Because a subpoena *duces tecum*, having been served upon James T. Wilkinson, dated the 7th day of March, 1873, to

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produce on the trial "the family bible of the father of William W. Wilkinson, containing the record of the births of the family," and the said J. T. Wilkinson having, in response thereto, sworn that there was no family bible of the father of said W. W. Wilkinson, but that there was a bible purporting to be such a record which was in his mother's possession up to her death, and then went into his sister's, Miss Wilkinson's possession, from whom he, witness, got it, but they did not recognize it as containing a correct record of the births of the family; that the record was neither in the handwriting of his father nor of his mother, but he believed in the handwriting of Mrs. Sanford, a deceased half-sister, and that he had given it to Mr. Whittle, the plaintiff's counsel; and that he, witness, was acting as agent for plaintiffs, and managing this case for them; the court, under this state of facts, erred in not requiring the said bible to be produced in court by Mr. Whittle, who acknowledged that it was in his office, just across the street from the court-house, defendant's counsel stating that they expected to prove by said bible, and the record therein, that the assured's age was greater than forty-two by several years.

6th. Because notice having been served upon the plaintiff's counsel on the 7th of March, 1873, to produce on the trial "the family bible of the father of William W. Wilkinson, containing the record of the births of the family," under the facts set forth in the seventh ground of this motion, the court erred in not requiring Colonel Whittle to produce the bible in his possession, and at his office, across the street.

7th. Because the court erred in refusing to charge the jury the following written request of defendant's counsel: "That the jury must be satisfied from the evidence that the proof of death is properly and legally made out, and in a reasonable time, and that a delay of several months is not a reasonable time."

8th. Because the court erred in charging the jury on the point of false or fraudulent statements of insured as follows: "In considering the question as to false or fraudulent statements made by the insured, you may consider, if you shall

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think it throws light on the question, how and by whom this insurance was gotten up, whether at the instance of the insured, or by the agent of the company."

9th. Because the court erred in charging the jury, on the point of false representation of the age of insured, as follows: "The defendant claims that the insured made a false statement in his application, as to his age, and represented himself as several years younger than he actually was; and that he knew his true age, and did not make the statement as to his age in his application believing it to be true. If the defendant has proved this to your satisfaction, then I charge you that such false representation as to age is material, and will vitiate the policy. As before stated, defendant must prove this, but, gentlemen, what witness has sworn that he was over forty-two? It is not proved by proving the age or ages and number of older brothers of the insured, unless there is also proof of the time intervening between their birth or births, and that of the insured. Nor does the statement of the insured in his application, as to the ages of such older brothers, prove this. The insured could not have personal knowledge of the ages of persons older than himself, and if he made a mistake in his application as to their ages, it would not be of such materiality as to avoid the policy."

10th. Because the court erred in charging the jury on the tenth question, whether insured had ever had any serious illness, local disease, affection, or personal injury; if so, of what nature and when was it? as follows: "Defendant further claims that this policy is made void by the answer of the insured to question number ten, in application, in this, that the insured is required to state what serious illness, local disease, affection or personal injury he had had in his past life. To this, it is claimed by defendant, that insured replied, 'a slight case of pneumonia in January previous,' without more, and this is claimed by defendant to have been fraudulent, and that the policy is thereby avoided. These expressions in the question must mean not only serious illness, but *serious* local disease, or serious affection, or serious personal injury. Local

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disease means the disease of some organ or part, as the lungs, stomach, bowels, or the like; but it is not every belly-ache or trivial organic derangement in his previous life that the insured must remember and put down in answer to this question. This answer calls for the putting down in answer thereto such *serious* illness or local disease, or affection, or personal injury, as by their intensity or duration have impaired the system, and thereby diminished the chance of the duration of the life of the insured, and would thereby increase the risk of the insurer, or such as by the tendency of the system to their future recurrence would diminish the chances of life and increase such risk; something that would confine a man to his bed or room, or lay him up. A man could not have any serious illness who was in camp fighting and exposed to the hardships of such a life. It means serious chronic disease. I charge you that taking liver pills, without more, don't prove that Wilkinson had such a disease. And if you shall find from the proof that his family physician made similar answers, in substance, to these matters that the insured did, I charge you to consider that as bearing on the question whether the insured did not believe he was truthfully making all the answers thereto that the question properly required of him. But if, in accordance with these instructions, you shall find such answers to be false, and that the insured did not believe them to be true, then I charge you that the policy, for this cause, would be void, and you will find for the defendant."

The motion was overruled, and plaintiff in error excepted.

JACKSON, NISBET & BACON, for plaintiff in error.

WHITTLE & GUSTIN, for defendants.

TRIPPE, Judge.

1. The question made in the third ground of the motion for a new trial, is, as to the admissibility of the testimony of J. W. Warren, by whom it was proposed to prove certain ad-

missions of Mrs. Wilkinson, one of the plaintiffs. This is the first point we notice—the first and second grounds being generally that the verdict is contrary to law and the evidence, which, under the judgment we render, it is unnecessary to consider. The court, on the trial, ruled out these admissions. In this we think there was error. The policy of insurance recites that the premium was paid by the beneficiaries thereof, the plaintiffs. It is made payable to them jointly, and they bring a joint action to recover the amount of insurance. The Code, section 3784, provides that “the admission of a party to the record is admissible in evidence, when offered by the other side, except in the following cases: 1st. In case of a mere nominal party or naked trustee. 2d. When there are several parties with no joint interest, the admission of one cannot be received unless the issue is of such a character that the effect of the admission can be restrained to him alone.” Other exceptions are stated which do not affect this question. There is nothing in this enactment which changes the old rule as laid down by Greenleaf and Phillips, so far as it is applicable to the point we are considering, but it is rather a statutory indorsement of it. Greenleaf says “if the parties have a joint interest in the matter in suit, whether as plaintiffs or defendants, an admission made by one is, in general, evidence against all:” Gr. Ev., 1, 174. In 1 Phill. Ev. 373, it is thus stated: “It appears to be a general principle that in a civil suit by or against several persons who have proved to have a joint interest in the decision, a declaration made by one of those persons, concerning a material fact within his knowledge, is evidence against him and against all who are parties with him in the suit.” It is admitted that the interest must be *joint*, and that a mere *community* of interest, as Mr. GREENLEAF styles it, is not sufficient to render the admission of one party evidence against his co-party, and the cases of co-executors, tenants in common, and trustees are given to show this. In such cases there is not a joint interest that will make one individually liable on the declaration of his co-executor, co-trustee or co-tenant. But where the parties to a

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suit, either as plaintiffs or defendants, set up in a joint suit a joint claim, resting on one and the same contract, with an issue applying to them jointly, the declarations or admissions of one are evidence against his co-plaintiff or co-defendant: 8 Bing, 309; 1 Stark. R., 488; 17 Mass., 222; 23 Maine, 69; 4 Harr. & M., 346; 8 Mo., 627; 9 Humph., 750; 4 Yates, 532.

2. No witness who is not an expert as to the matter about which he is testifying, can give an opinion unless he states the facts on which that opinion is founded. This rule applies to one by whom it is proposed to prove the condition of the health of a party. We did not understand counsel in the argument to disagree on this point. Tested by this rule, it was not competent for the witness, Brown, to state that when the person, about whom he was testifying, "matured in life, his diseased condition developed," especially when it was intended thereby to prove that he suffered from a particular disease. He should have gone further and stated the facts as to the development of that disease. Nor was it sufficient to let it in, when the witness said "*he was told* that his (witness') liver was affected," and that the party referred to "had symptoms like his" (witness'.) This was too uncertain and indefinite. He neither said it was true that he himself had a diseased liver, or stated anything showing it, or even gave his own opinion that it was so. His only authority was, that he was told it. By whom? Had he stated that it was by a physician who attended him and administered to him for that disease, the question would be different. But it would be too loose a rule to allow testimony like that to be received, to establish the fact that a person at a particular time had a particular disease.

3. It is only necessary to say in reference to the testimony of Sasser and Willis that the grounds upon which the court put the refusal to rule out or exclude their testimony, need not exist at any future trial. It may be said that if a party objects to the answers of a witness to cross-interrogatories put by himself, the proper rule is to withdraw those questions. We do not say that by not withdrawing them he loses all

right to move afterwards to have them and the evidence withdrawn from the jury by the court: 10 *Georgia*, 186; 13 *Ibid.*, 511. We can very easily conceive where the other party may have acted on that part of the testimony in the further progress of the cause, and perhaps rested his case on it—that, in a certain stage of it, to-wit: after the argument is concluded or the charge given to the jury, or all witnesses dismissed, the question would be largely within the discretion of the court. As this difficulty will doubtless not occur hereafter, nothing now need be said on this point.

4. The same may be said as to the notice to produce the family bible. Any defect in it may be cured by another notice. We do not think the court erred in holding that a notice to produce the "father's family bible," did not require the production of the one described by the witness.

5. Was the bible which was described by the witness admissible? As the court put its refusal to grant the new trial on the ground that it was not, and as the question was discussed in the argument and will certainly be presented again, we will consider it. Section 3772 of the Code provides that "pedigree, including descent, relationship, birth, marriage and death, may be proved either by the declarations of deceased persons related by blood or marriage, or by general repute in the family, or by genealogies, inscriptions, family trees, and similar evidence." We know of no rule requiring that the "genealogy, inscription, family tree, or similar evidence," should be actually written by the father or the mother. If the registry is recognized by either as such—that is, by the mother, the father being dead—is kept by her, and after her death goes into the possession of a daughter, is in the handwriting of another daughter, who is deceased, and is still preserved in the family, it comes within the terms "similar evidence," and is certainly equivalent to "declarations of a deceased person related by blood or marriage," even if it be not competent under other words used in the section quoted. The fact that the witness who stated all this added that the mother said it was copied by the daughter, and that he and the fam-

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ily did not acknowledge the record as correct, does not render it incompetent. He did not say in what it was not considered correct, nor did he say that the mother, or the daughter in whose handwriting it was, did not consider it correct. The facts stated by him might be considered by a jury in determining the weight to be given to the registry as evidence, for it certainly is not conclusive, and it is subject to be weakened or strengthened by all the proof in reference to it.

6. The question as to giving notice of the death of the person whose life was insured to the company within a reasonable time, was one for the jury, under proper instructions, to be given them in charge, and was not to be absolutely passed upon by the court. It was not error to refuse to charge as requested by defendant on that point.

7. Nor was it error to charge the jury, that "in considering the question as to fraud, you may consider if you think it will throw any light on the question, how and by whom the insurance was gotten up, whether at the instance of the insured or by the agent of the company." It was only saying that they might consider the circumstances attending the whole transaction. The matter referred to might be of greater or less weight, as the jury should weigh it in the light of all the other evidence.

8. We think the court went too far in its charge to the jury, as excepted to in the eleventh ground of the motion for a new trial. The defendant introduced evidence to show that misrepresentations had been made in the application as to the age of the insured. Without giving an opinion as to the strength or force of that testimony, we say the court below should have refrained from charging that a portion of that testimony did not show what the defendant claimed it did. The application stated the age of the insured to be forty-two, and two of his brothers to be forty-four and forty-six, respectively. That indicated pretty strongly that there were two years between their several births. From the testimony of one of those brothers, it seemed he was about four years older than the application made him. If the difference between

applicant's age and that brother's was represented by him to be four years, or two years, (and did not defendant have the right so to argue?) would it not suggest that the applicant was as much older than the age stated by him, as his elder brother was proved to be over the age which was given to him in the application? Certainly, when all this testimony is looked to, the charge of the court went beyond its powers, as indicated in section 3248 of the Code.

9. One of the questions in the application was, whether the applicant "ever had any serious illness, local disease, affection, or personal injury." There was no error in the construction given to this by the court. The charge was, that the word "serious" applied to and qualified each of the terms "local disease," "affection" and "personal injury." Any other construction would have required the applicant to comply with an impossibility, and would be trifling with his rights and with common sense. To have asked one over forty years of age to state every "affection," "local disease" or "personal injury" which he might have had or endured in his lifetime, whether serious, or light and trifling, would be absurd. No one could possibly meet such a question, and it would make the catalogue nonsense as to all practical purposes when it appeared. The object of the question was patent, and a proper one, and the direction given by the court meets it.

10. We are aware of the strict rulings in most of the decisions, that where the statements of the insured are incorporated into the contract of insurance, and are made the basis of it, they are held to be warranties: 6 Cush., 341; 1 Bigelow, 252; *Ibid.*, 173; *Ibid.*, 76; 1 C. & P., 360; 2 Comp. M., 348, and numerous others. In many of these it was held that the question of the materiality of the representations or misrepresentations was a matter that could not be set up by the insured or the beneficiaries in the policy, that when they amounted to warranties, the truth of them was the only question, and it could not be said that they were unimportant or immaterial so as to avoid the effect of their being untrue. We think the provisions of our Code determines this ques-

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tion. It is therein provided that "every application for insurance must be made in the utmost good faith, and the representations contained in such application are considered as covenanted to be true by the applicant. Any variation by which *the nature or extent or character of the risk is changed*, will void the policy:" Section 2802. The next section adds: "Any verbal or written representation of facts by the assured to induce the acceptance of the risk, if material, must be true or the policy is void." Under these and the other provisions in the Code on this subject, we do not think that such representations as we are considering amount to warranties, so as that the policy will be vacated if any of them are untrue, whether material or not. But the proper construction is that if there be any variation in them from what is true, whereby the nature or extent or character of the risk is changed, the policy, if it makes them the basis of the contract of assurance, will be void, and that this will be so whether they are or are not wilfully or fraudulently made.

Judgment reversed.

CASES ARGUED AND DETERMINED

IN THE

Supreme Court of Georgia,

AT ATLANTA.

JANUARY TERM, 1875.

PRESENT—HIRAM WARNER, CHIEF JUSTICE.
H. K. McCAY,
ROBERT P. TRIPPE, } JUDGES.

EUGENE S. BALLIN & COMPANY *et al.*, plaintiffs in error, *vs.*
M. FERST & COMPANY *et al.*, defendants in error.

The refusal of a motion to dissolve an injunction, granted on order to show cause, is not subject to review by this court, under sections 3212 *et seq.* of the Code, even though said motion may have been made by defendants who have had themselves made parties since said writ was ordered to issue. This principle applies as well to a motion to vacate the appointment of a receiver. (R.)

Injunction. Receiver. Before the Supreme Court. January Term, 1875.

The above head-note explains itself.

WEST & CUNNINGHAM; A. T. AKERMAN, for plaintiffs in error.

J. R. SAUSSY; HOWELL & DENMARK; JACKSON, LAWTON & BASINGER; GEORGE A. MERCER, for defendants.

Herrington vs. The State of Georgia.—Davis vs. Sims.

C. C. HERRINGTON, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

Where, after the argument of a criminal case in this court, but before the judgment is pronounced, the defendant dies, the proceedings abate, and no decision will be pronounced. (R.)

Criminal law. Practice in the Supreme Court. Before the Supreme Court. January Term, 1875.

The above head-note sufficiently reports this case.

W. F. WRIGHT; PEEPLES & HOWELL, for plaintiff in error.

JOHN T. GLENN, solicitor general, for the state.

M. C. DAVIS, plaintiff in error, vs. THOMAS W. SIMS, administrator, defendant in error.

Where the clerk's certificate to the bill of exceptions is not signed, but has simply the seal of the court thereto attached, the writ of error will be dismissed. (R.)

Bill of exceptions. Certificate. Seal. Practice in the Supreme Court. January Term, 1875.

The above head-note explains itself.

L. L. MIDDLEBROOKS, for plaintiff in error.

E. WOMACK, for defendant.

Corley & Dorsett vs. Central Railroad and Banking Company.

CORLEY & DORSETT, plaintiffs in error, vs. GEORGIA RAILROAD AND BANKING COMPANY, defendant in error.

Where there is no certificate of the clerk attached to the bill of exceptions, but in the same package therewith is found a certificate in the usual form, but having no entry thereon designating to which case it belonged, which the clerk of this court stated was received after the other papers in the case, it having been forwarded in response to a letter by him to the clerk of the court below informing him that he had failed to forward such certificate with the papers, the writ of error will be dismissed. (R.)

Bill of exceptions. Practice in the Supreme Court. January Term, 1875.

The above head-note reports this case.

J. J. FLOYD ; L. L. MIDDLEBROOKS, for plaintiffs in error.

CLARK & PACE, for defendant.

SARAH C. GRADY, trustee, *et al.*, plaintiffs in error, vs. NATHANIEL H. BARDEN, defendant in error.

The fact that the defendant in error was the clerk of the superior court who certified the transcript of the record and the bill of exceptions, does not cure the absence of service. (R.)

Service. Officers. Practice in the Supreme Court. January Term, 1875.

When this case was called a motion was made to dismiss the writ of error because no service appeared on the bill of exceptions. It was replied that the defendant in error was the clerk of the superior court who certified the record and bill of exceptions, and therefore had full notice of all the proceedings in the case. The writ of error was dismissed.

B. H. BIGHAM ; F. M. LONGLEY, by brief, for plaintiffs in error.

E. H. WORRILL ; JAMES M. MOBLEY, for defendant.

Colbert *vs.* Parish & Company *et al.*

WILLIAM T. COLBERT, sheriff, plaintiff in error, *vs.* W.A. PARISH & COMPANY *et al.*, defendants in error.

An award upon a bill, to which the sheirff was made a party simply for the purpose of enjoining him from selling under an execution, containing recitals charging such officer with a large sum of money, does not estop him from traversing such recitals on a rule against him based on such award, although it may have been made the judgment of the court.

Arbitrament and award. Sheriff. Judgments. Estoppel. Before Judge BARTLETT. Morgan Superior Court. September Term, 1874.

For the facts, see the decision.

BILLUPS & BROBSTON, for plaintiff in error.

H. D. MCDANIEL, for defendants.

WARNER, Chief Justice.

This was a rule against the sheriff of Morgan county, calling upon him to show cause why he should not pay to the plaintiffs' attorney the sum of \$778 00, which was awarded to them from the proceeds of certain property alleged to have been sold by the sheriff. The sheriff answered the rule denying his liability to pay the money under a rule, as sheriff, for the reasons therein set forth. The plaintiffs traversed the sheriff's answer, and on the trial of that issue, the jury, under the charge of the court, found a verdict against the sheriff. A motion was made for a new trial on the several grounds set forth therein, which was overruled by the court, and the sheriff excepted.

It appears from the evidence in the record, that in the year 1866, Lane foreclosed a mortgage on certain described mill property, and had the same levied on and advertised for sale by the sheriff. Nash, one of the copartners in the mill property, filed a bill praying for an injunction to restrain the sale of the property, and the sheriff was made

a formal party to that bill for the purpose of the injunction only; no writ of subpoena was prayed for against the sheriff in that bill. Subsequently to the granting the injunction, it appears that the parties in interest, to-wit: Nash, the complainant in the bill, and Morrison, Nall and Lane, the defendants, agreed to refer the matters in controversy between them to two arbitrators, who made an award, which was afterwards made the judgment of the court. It does not appear that the sheriff had anything to do with this submission and award, or that he was a party thereto in any manner whatever, except that he acknowledged service on the injunction bill. There are several facts recited in the award by the arbitrators which go to charge the sheriff, and the question is, whether the sheriff was bound by that award and the recitals contained therein, so as to *estop* him from showing the truth of the matters involved, on the trial of the issue on the rule taken against him for the money claimed under that award? The court charged the jury "that if they believed the award and decree existed, they should find the issue in favor of the movants, and that the rule should be made absolute." The general rule that the judgment of a court having jurisdiction of the parties and the subject matter, is conclusive between parties and privies as to the facts directly in issue which it decides, until reversed or set aside, is recognized. But in this case the sheriff had no personal interest in the subject matter of the original bill, and he was only made a party thereto because he was the officer appointed by law to execute the process of the court, and the only effect of his acknowledgment of service on the bill was to show that he had notice of the injunction restraining him from the execution of that process. In no other sense, and for no other legal purpose, could the sheriff have been properly considered a party to that bill, and he was not bound by the agreement of the parties to that bill to submit their private claims to the award of arbitrators and the decree rendered thereon. The award and the decree of the court thereon did not *estop* the sheriff, as a public officer, when

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ruled for a violation of his official conduct, from showing the truth of the case because he had acknowledged service of the writ of injunction, as before stated. The sheriff had no personal interest in the subject matter referred to the arbitrators by the parties to the injunction bill, and was not bound by their judgment in relation thereto; his official conduct as sheriff was not submitted by him to the arbitrators for their judgment and decision, and therefore he was not bound by it.

Let the judgment of the court below be reversed.

PORTER FLEMING, plaintiff in error, vs. GEORGE W. WILLIAMS & COMPANY, defendants in error.

1. On the trial of an affidavit of illegality making the issue that affiant was never served with a copy of the declaration and process, it is not error for the court to charge the jury that the return of a deceased sheriff showing service, is as good testimony as if the sheriff were in court and testified to the fact—that the law made the return of a sworn officer very high evidence, and a jury should be well satisfied that it is not true before they find against it.
2. In connection with the return of a deceased sheriff entered on the writ, it is competent to introduce in evidence the docket which he kept, as sheriff, with a similar entry, and which was proved to contain, in his handwriting, entries which he always made of his actings as sheriff.

Illegality. Service. Sheriff. Return. Evidence. Before Judge POTTLE. Richmond Superior Court. October Term, 1873.

An execution in favor of George W. Williams & Company was levied upon certain property as belonging to the defendant, Porter Fleming. An affidavit of illegality was filed, setting up that the defendant had never been served.

To show service, the plaintiffs introduced the original writ showing personal service by the sheriff, and also a docket kept by said officer, since deceased, containing a similar en-

try, in his handwriting. To this book objection was made and overruled. To which ruling defendant excepted.

The court charged the jury, "that the evidence on the question of service was that of the sheriff's return and his docket, and that they must take his return as evidence, just as usual—as if the sheriff was on the stand testifying as a witness. That it was just the same as if he were in court, and testified under oath before them that he had made personal service of the writ at the time it recites. That the law made the return of a sworn officer very high evidence, and this return was under his oath of office, and they must be well satisfied that his return was untrue before they could find for the defendant."

To this charge the defendant excepted.

The jury found for the plaintiff in execution. Error is assigned upon each of the above grounds of exception.

HOOK & WEBB, for plaintiff in error.

FRANK H. MILLER, for defendants.

TRIPPE, Judge.

1. In *Davant et al. vs. Carlton*, 53 Georgia, 491, it was held that it was error in the court to refuse to charge the jury that under the law it required the strongest evidence to overcome the effect of the sheriff's entry, and to charge in lieu thereof that the sheriff's entry was *prima facie* evidence, but, like other presumptions, it might be rebutted by proof. Formerly such a return was conclusive and could not be traversed. The right is now given to contradict it, but this was not intended to reduce the force of such an entry to that of mere *prima facie* evidence. Nor does the fact that the sheriff is dead affect the force of such an entry as testimony. It was made under oath by a sworn officer, in the discharge of his official duty, and is of equal weight with his testimony delivered on the stand as a witness.

2. As to the admissibility of the book called the sheriff's docket, the decision of the court in permitting it in evidence

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is sustained by *Field vs. Boynton*, 33 Georgia 239. It is true the entries made by the sheriff in that book were not required by law to be so made by him, nor were those which were admitted in evidence in *Field vs. Boynton* such as the law imposed upon the sheriff as a duty, to make. For the grounds upon which the judgment was put in that case, see the decision, and also 1 Ph. Ev., 318; 1 Gr. Ev., secs. 147, 151, note 2. Judgment affirmed.

W. H. CAMP, plaintiff in error, vs. LOUIS CAHN, defendant in error.

1. An affidavit upon which an attachment for purchase money is based, which states that the defendant is indebted to the plaintiff in the sum of \$767 65, and that said indebtedness was created in part by the purchase of a one-half interest in certain property specified, is insufficient. It should state the part that was the consideration of the indebtedness, and the amount due therefor.
2. A plaintiff in attachment, where the property levied on has been replevied, is entitled to proceed for his judgment as in other cases at common law, though the attachment may have been dismissed.

Attachment. Judgments. Before Judge COWART. City Court of Atlanta. December Term, 1875.

For the facts of this case, see the decision.

P. L. MYNATT; HOKE SMITH, for plaintiff in error.

JACKSON & CLARKE, for defendant.

WARNER, Chief Justice.

This was an attachment sued out under the provisions of the 3293d section of the Code. The plaintiff made the following affidavit for the purpose of obtaining the attachment:

"GEORGIA, FULTON COUNTY.—Before me, the subscriber, a notary public in and for said county of Fulton, personally came and appeared W. H. Camp, who, on oath, deposed

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and saith, that Louis Cahn is indebted to him in the sum of \$767 65, and that said indebtedness was created, in part, by the purchase of a one-half interest in the following property by the said Louis Cahn, from the said W. H. Camp, to-wit: Ten kegs nails at \$5 00, \$50 00; twelve boxes ink at \$1 00, \$12 00; twenty-four wash-tubs at \$3 00, 72 00; one hod water buckets, \$50 00; one hod sugar buckets, \$15 00; forty-five boxes tea, five pounds each, at \$2 00, \$90 00; eighteen boxes soap, at \$2 50, \$45 00; three hundred bar. head, \$27 00; one pair trucks, \$9 00; one flour scales, \$50 00; one iron safe, \$140 00; one desk and money drawer, \$18 00; one bay mare, \$115 00; one dray and harness, \$112 00; one table, \$1 75; one office chair and fine state chair, \$4 00; one partition, \$10 00; one letter press, \$3 00; one lot in second ward of the city of Atlanta, Fulton county, on the south side of Jones street, bounded on the west by E. Murpley's property, thence two hundred and twelve to an alley, thence running east forty-seven feet to J. O'Neal's line, thence back to Jones' street two hundred and twelve, thence west along Jones' street to beginning corner, said lot now being unoccupied, \$500 00; and that the debt is now due and unpaid, and that all the foregoing property is in the possession of Louis Cahn. [Signed] W. H. CAMP.

"Sworn to and subscribed before me,

"2d day of May, 1874.

"JOHN T. GLENN, *Notary Public*."

On the trial of the case, as it appears from the record, the defendant, having replevied the property on which the attachment had been levied, made a motion to dismiss it, because the amount due for the purchase money of the property attached, was not sufficiently stated in the affidavit as required by the statute, which motion was sustained by the court, and the plaintiff excepted. The plaintiff then proposed to go on with the trial of the case as at common law, having filed his declaration and shown that the defendant had appeared and replevied the property levied on by giving bond

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as the statute requires in such cases. The defendant objected, and made a motion to dismiss the case, which was sustained by the court, and the plaintiff excepted.

1. There was no error in dismissing the attachment on the ground that the affidavit was too vague and uncertain as to the amount of the debt due to the plaintiff for the property. The affidavit states that the defendant was indebted to the plaintiff in the sum of \$767 65, and that said indebtedness was created in *part* by the purchase of a one-half interest in the following property as set forth in the affidavit; *what part* the affidavit does not state, nor is it stated what is the amount due for *the part* which he did purchase, but the court is asked to infer what was the amount, from the account annexed to the affidavit. The statute requires the plaintiff in attachment to state the amount of the debt claimed to be due for the property for which the debt was created.

The other question in the case, is whether the plaintiff in attachment when the property attached has been replevied by the defendant in attachment, is entitled to proceed against him and obtain a judgment, as in other cases at common law, when the attachment has been dismissed, as provided by the 3309th section of the Code. In other words, is the replevying the property attached by the defendant such an appearance and notice of the pendency of the attachment and of the proceedings thereon, as will entitle the plaintiff to proceed against him on the declaration filed, and establish his demand as in other cases at common law, although the attachment may have been dismissed. The 3319th section of the Code provides for replevying the property attached by the defendant's giving bond, etc. In *Reid and wife vs. Moore*, 12th Georgia Reports, 368, it was held that giving a replevy bond in an attachment suit, under the act of 1799, was an appearance by defendant. The 3328th section of the Code declares that "when the defendant has given bond and security, as provided in section 3319 of this Code, or when he has appeared and made defense by himself or attorney at law, or when he has been cited to appear, as provided in section 3309 of this Code,

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the judgment rendered against him in such case, shall bind all his property, and shall have the same force and effect as when there has been *personal* service, and execution shall issue accordingly, but it shall be first levied upon the property attached. In all other cases, the judgment on the attachment shall only bind the property attached, and the judgment shall be entered only against such property." The suit is originally commenced by attaching the defendant's property, but the plaintiff may give him ten days notice of the pendency of the attachment before final judgment, as provided by the 3309th section of the Code, and obtain a general judgment against him as at common law. When the defendant appears and replevies the property attached, he has notice of the pendency of the attachment against his property for the collection of the plaintiff's demand, and no good legal reason occurs to us why the plaintiff should not be allowed to proceed to establish his debt, and obtain a general judgment against the defendant in the same manner as he might do by giving the ten days notice, as provided in the 3309th section, and such, in our judgment, is a fair interpretation of the 3328th section of the Code. Construing the several sections of the Code relating to attachments, as one act, the court erred in dismissing the plaintiff's declaration, and preventing him from proving his debt against the defendant for the purpose of obtaining a judgment as at common law, although his attachment had been dismissed.

Let the judgment of the court below be reversed.

ANDREW L. BOYD, plaintiff in error, vs. A. B. MERRIAM,
defendant in error.

Land was sold by the sheriff, under three *fi. fas.*, two from a justice's court and one from the superior court, the purchaser put in possession, and the execution satisfied by the sale. The defendant in execution brought suit for damages against the plaintiff in the *fi. fa.* issued

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from the superior court, on the ground that his execution was illegal and void :

Held, that the action could be maintained, and that the court erred in granting a non-suit.

Trespass. Execution. Judicial sale. Before Judge HOPKINS. Fulton Superior Court. March Term, 1874.

A report of this case is unnecessary.

M. A. BELL, for plaintiff in error.

THRASHER & THRASHER, for defendant.

TRIPPE, Judge.

It was not denied on the argument by defendant in error that his execution was illegal and void. Counsel for defendant rested his case on the ground that there were two other *fi. fas.* also levied on the same property at the same time, and as under them the sale was legal, he cannot be held liable for having his execution also levied. This position cannot be maintained. The fact that a valid and legal *fi. fa.* is levied on a defendant's property, and is proceeding to sell it, neither justifies or excuses the enforcement of a void process against that property. • Were it so, it would operate as an outlawry, in one sense, of any man's estate, if there happened to be a good judgment against it which was being enforced. It seems that in this case the three executions were all levied, the property sold under the three, and that defendant's *fi. fa.* participated in the proceeds of the sale; and under that sale the purchaser was put in possession. Because a man may be lawfully stricken down, it is no excuse for a third person to deal him another *unlawful* blow. As to whether an illegal levy upon land is a trespass, see *McDougald vs. Dougherty*, 12 *Georgia*, 613, approved in *Wallace et al. vs. Holly*, 13 *Ibid.*, 392. If the levy itself did not constitute a trespass, the sale and delivery of possession by the sheriff to the purchaser would complete it. We think the court erred in dismissing plaintiff's action.

Judgment reversed.

SHEPHERD, MCCREERY & COMPANY, plaintiffs in error, vs.
JOHN RYAN, executor, defendant in error.

1. Where a *scire facias* was sued out to revive a judgment which was not, at the time of the institution of such proceedings, dormant, but which does become dormant pending the *scire facias*, the allegation of such new facts, by amendment, will not prevent the dismissal of the *scire facias*.
2. A *scire facias* was sued out, not only requiring an executor to show cause why a judgment obtained against his testator during his life should not be revived, but also why he should not be made a party thereto in place of the deceased. The judgment was not in fact dormant at the time such proceeding was instituted, but became so pending the same. The plaintiff was, nevertheless, entitled to proceed for the purpose of making the executor a party; and having attained this end, he might, by amendment, require such executor to show cause why such judgment should not be revived.

Scire facias. Judgments. Administrators and executors. Amendment. Parties. Before Judge HOPKINS. Fulton Superior Court. October Term, 1874.

This case is fully reported in the decision.

L. E. BLECKLEY, for plaintiffs in error.

A. W. HAMMOND & SON, for defendant.

WARNER, Chief Justice.

On the 30th of December, 1869, the plaintiffs sued out a *scire facias*, in which they alleged that on the 18th day of April, 1855, they obtained a judgment against one Lamb, who, since the rendition of said judgment, had departed this life leaving an estate, and that John Ryan had been appointed executor of said Lamb. The plaintiffs also alleged that said judgment had become dormant. Therefore the said John Ryan, executor of said Lamb, deceased, was required to show cause at the next term of the superior court why he should not, as executor aforesaid, be made a party defendant to said judgment in lieu of said Lamb, deceased, and also to

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show cause why said judgment should not be revived. The *scire facias* was duly served on Ryan, and continued on the docket until the last fall term of the court, when it came on to be heard. The defendant made a motion to dismiss the *scire facias*, on the ground that the judgment was not dormant at the date of the *scire facias*. The plaintiffs then amended their *scire facias*, and alleged that at the time of bringing the *scire facias*, as the law was then held by the supreme court of the state, said judgment was dormant, which holding of the court was not changed or reversed until the year 1873, and in the meantime the said judgment, pending this *scire facias*, had become dormant as the law is now held by the supreme court, and needs to be revived, and is still unpaid, the plaintiffs offering to do equity by payment of costs, etc., and that the said executor be required to show cause why said judgment should not now be revived, without compelling them to commence a new proceeding for that purpose. By the entries on the execution, as shown by the record, it is clearly apparent that the judgment was not dormant at the date of the filing of the original *scire facias*; indeed, that fact was not disputed under the law as now held and recognized by this court. The court sustained the motion to dismiss, holding that the judgment was not dormant when the *scire facias* was brought, and the proceeding being then without foundation, can derive no support from what has transpired since. Whereupon the plaintiffs excepted.

1. If the original *scire facias* had not sought to do anything more than to revive the judgment, if that had been its only object and purpose, then the judgment of the court dismissing it would have been unquestionably right. Whilst the judgments of this court in relation to the dormancy of judgments in the cases in which the same were rendered would be the law as to those cases, still it would not have been the general law of the state which the court could have recognized, when those decisions had been reversed and declared not to be the law as applicable to dormant judgments.

2. The *scire facias* not only called upon the executor to

show cause why the judgment should not be revived, but also called on him to show cause why he should not be made a party defendant to the judgment in lieu of Bernard Lamb, deceased, and the question is, whether the plaintiffs were not entitled to have had their *scire facias* kept in court for *that purpose*. It is true, that under the law of this state, the plaintiff in a judgment obtained against a defendant in his lifetime may enforce it against his property after his death, without making his executor or administrator a party defendant thereto; but suppose he desires to make the executor or administrator a party defendant to the judgment, has he not the legal right to do so by *scire facias*, according to the common law of force in this state? That was the mode prescribed by the common law anterior to the revolution, and we are not aware of any statute of this state in conflict with that common law rule, and it is often essential to the rights of the parties that the executor or administrator should be made a party defendant to a judgment obtained in the lifetime of the testator or intestate, and in the absence of any statutory provision for that purpose, we must look to that nursing mother, the common law, for the remedy, and there we find that the remedy provided is by *scire facias*. The judgment obtained against the testator in his lifetime may be enforced by an execution after his death, without making his executor a party thereto, by levying the same on his property, if to be found. But suppose the property of the testator consists of money and *choses* in action, which are not subject to levy and sale, and are in the hands of the executor, and the plaintiff desires to reach the assets and have the same appropriated in satisfaction of his judgment, what is his proper remedy? By the well established principles of the common law, the plaintiff could not bring an action of debt on the judgment against the executor suggesting a *devastavit*, because the executor was no party to that judgment. The rule is thus stated by Williams on Executors, volume 2, 1700: "But no action of debt suggesting a *devastavit* by the executor lies against him upon a judgment obtained *against his testator*; because that is no

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admission of assets by the executor, and therefore, in such cases, it is necessary to sue out a writ of *scire facias* against the executor to make him a party to the judgment." The case of *Beavick vs. Andrews*, 2 Lord Raymond, 972, supports the rule as stated by Williams. See, also, *Wheatley vs. Lane*, 1 Saunders' Reports, 219, note *b*. When the executor is made a party to the judgment obtained against his testator, by the judgment of the court, on the return of the *scire facias*, then it is his duty to plead thereto in the manner pointed out by law for his protection as such executor, if he has any defense to make. Inasmuch as the plaintiffs had the legal right to have had the *scire facias* issued against the defendant, as executor, to show cause why he should not be made a party defendant to the judgment obtained against his testator, it was error in the court to dismiss the *scire facias*, although the judgment sought to be revived was not dormant. And the court having the parties properly before it by *scire facias*, there would seem to be no legal or equitable reason why the *scire facias* should not be amended upon such terms as the court might think proper to impose for the protection of the rights of the defendant, so as to prevent surprise, and to require him to show cause why the judgment should not be revived, if, indeed, it had become dormant during the pendency of the *scire facias*. *Scire facias* is amendable as other pleadings: Code, sec. 3489. This, in our judgment, would be in harmony with the spirit and intention of the provisions of the Code. Whether the judgment is, in fact, now dormant or not, we express no opinion; we leave that an open question, to be decided when the defendant shall have been heard.

Let the judgment of the court below be reversed.

CÆSAR WATERS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. On a trial for burglary in the night time, it is incumbent on the state to show affirmatively, by positive testimony or other satisfactory evidence, that the offense was committed in the night.
2. Where it appears from the evidence that the burglary must have been committed within a period of about forty or forty-five minutes—one-half of which was before the close of day—and there is nothing to throw further light on the question as to the time, the defendant should have the benefit of the doubt necessarily arising, and should not be convicted of burglary in the night time. And this rule ought to be the more readily extended to him, when the chief testimony relied on by the state is the possession by the defendant of the stolen property, to-wit: a watch, several days after the burglary was committed.

Criminal law. Burglary. Evidence. Before Judge HOPKINS. Fulton Superior Court. October Term, 1874.

This case is sufficiently reported in the above head-notes.

JOHN A. WIMPEY, for plaintiff in error.

JOHN T. GLENN, solicitor general, for the state.

TRIPPE, Judge.

1. The proposition is unquestioned that in all criminal prosecutions it is incumbent on the state, on the traverse trial, to show affirmatively, either by positive testimony or other satisfactory evidence, that the defendant is guilty of the offense charged against him, or of some less crime which the law permits him to be found guilty of under the indictment. This rule applies to an indictment for burglary in the night. It was but a few years ago that this offense was punishable with death, or, by special recommendation of the jury, by imprisonment for life, whilst the penalty for burglary in the day was imprisonment from three to five years: Revised Code, sections 4321, 4322. Now the penalty for the former is imprisonment from five to twenty years; for the latter it is unchanged. Would it be going too far to say that when one

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is prosecuted for burglary in the night, the testimony should be such as to the time when it was committed as to exclude all reasonable doubt upon that point, before a verdict of guilty could be authorized. If there had been no change in the penalty, and that was yet a capital one, the rule would scarcely be doubted. As it is, the maximum for one grade is twenty years in the penitentiary, for the other five years.

2. Where the evidence leaves the time in which the offense was committed exactly balanced between day and night, that is, that it was committed within a period of about forty or forty-five minutes, one-half of which was day, and one-half was night, the defendant should have the benefit of the doubt necessarily arising, and the conviction should not be for the highest grade. If a jury reasonably doubt whether a defendant be guilty of murder or manslaughter, that doubt is resolved in favor of life. So, if the doubt be as to different grades of manslaughter, the defendant should have the benefit of it, and the lowest grade covered by that doubt is to be found. It would be difficult to limit the application of this principle, and we think it should control this case. The chief evidence against this defendant was the fact that he was in possession of the watch, which was taken from the house several days after the burglary was committed. I will not remark upon the character of such testimony, whether it is always sufficient to convict, for the authorities are somewhat in conflict; but we say, that, under the proof in this case, we think the defendant should have the full benefit of the first rule we announce in this decision.

Judgment reversed.

JOSEPH B. WYNN, plaintiff in error, vs. N. D. KNIGHT, defendant in error.

1. That the defendant in execution failed to replevy the property levied on by giving a forthcoming bond, was no ground to dismiss his affidavit of illegality.

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2. When a question of fact is involved in the judgment of a justice of the peace, and the amount in controversy exceeds \$50 00, the proper mode of having his decision reviewed is by appeal. If questions of law are alone involved, the remedy is by *certiorari*.

Illegality. Appeal. *Certiorari*. Justice Court. Before Judge BUCHANAN. Troup Superior Court. May Term, 1874.

For the facts of this case, see the decision.

C. W. MABRY, for plaintiff in error.

F. S. LOFTIN; J. S. WALKER, for defendant.

WARNER, Chief Justice.

This case came before the court below on a *certiorari* from a justice's court. On the hearing of the *certiorari* the court dismissed it on the ground that the amount in controversy was more than \$50 00, and that questions of fact were involved in the judgment of the justice's court. Whereupon the plaintiff in *certiorari* excepted.

1. One of the errors complained of in the *certiorari* is, that the justice's court dismissed the affidavit of illegality because there was no forthcoming bond given by the defendant. In *Herring vs. Saulsbury, Respass & Company*, 52 Georgia, 396, we held that a defendant, when he made an affidavit of illegality to an execution which had been levied on his property, *might* replevy it by giving bond and security for its forthcoming, but was not bound to do so, and that the failure to give such bond was not a good legal ground to dismiss the affidavit of illegality. This was the error of law complained of, and we think it was an error of law for the justice to have dismissed the defendant's affidavit of illegality because there was no forthcoming bond given.

2. But there were questions of fact involved in the judgment of the justice, as well as the question of law complained of, and when that is the case, and the amount involved is more than \$50 00, the remedy is by an appeal to the supreme

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court, and not by *certiorari*. If the only question involved is a question of law which must necessarily control the case, then a proper remedy is by *certiorari*. We find no error in the judgment of the court in dismissing the *certiorari* for the reason given, or as to the merits of the case upon the facts as disclosed by the return of the justice. In any view of the case, notwithstanding the justices erred in dismissing the defendant's affidavit of illegality for the reason given, their judgment was right upon the facts before them, and the *certiorari* was properly dismissed.

Let the judgment of the court below be affirmed.

JAMES RATTEREE, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

1. When the juror's name was A. J. Barry, and on the list furnished the defendant's counsel was A. J. Berry, and it was shown that he was generally called Berry, it was not error in the court to put the juror on the prisoner.
2. The sayings of the deceased which were offered in evidence, were not part of the *res gestæ*, and even if they had been made in *articulo mortis*, they were matters of opinion, and not of the facts connected with the killing.
3. The charge of the court fully covered all the provisions of the Code, and also the points involved in the request of the defendant's counsel which were applicable to the case.

Criminal Law. Jury. Evidence. *Res gestæ*. Charge of Court. Before Judge HOPKINS. Fulton Superior Court. October Term, 1874.

James Ratteree was placed on trial for the offense of murder, alleged to have been committed upon the person of W. L. Clifton on December 23d, 1873. The defendant pleaded not guilty.

Amongst the jurors put upon the defendant was one by the name of J. A. Barry. The name upon the list furnished to the defendant was J. A. Berry. No such name appeared upon

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the jury lists for the county, but he stated on oath that though his name was Barry, yet he was generally called Berry. When his name of Berry was called he answered to it. He was then sitting within ten feet of defendant. The court, on objection made, held him competent, and the defendant was thus compelled to challenge him peremptorily. To this ruling he excepted.

The evidence showed that the deceased and other friends, were going from the city of Atlanta to Fayette county in wagons. That when about one-half mile beyond West End he met the defendant, his two brothers, and a boy by the name of Silvey, coming in the direction of the city with a wagon drawn by oxen. That a controversy ensued, the details of which, in view of the decision, are immaterial here, in which the deceased was mortally stabbed by the defendant. That the deceased was placed in a wagon and carried about two hundred and fifty yards, when he said he could go no further, fainted and fell out of the wagon. That he was placed on the side of the road and rubbed with camphor. That the time that elapsed between the stabbing and the rubbing with the camphor was "a few minutes."

Under these facts the defendant proposed to prove by a witness by the name of Harbuck that when the deceased was being bathed with camphor, he said "if he died and went to hell it was his own fault; that the boys were not to blame." This evidence was excluded and the defendant excepted.

The evidence further showed that from the place above alluded to he was carried to the house of a Mr. R. W. Wood, where he remained about two weeks, during which time he had divers conversations with Wood, in all of which he expressed the belief that he would recover.

The defendant proposed to show by Wood that in one of these conversations the deceased had stated "that he did not want the boys hurt; that he was to blame; that the boy (defendant) was not to blame, that it was his own fault; that all he wanted was to catch them out some time and give them a whipping."

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This evidence was excluded and the defendant excepted.

The evidence further showed that the deceased died from the wounds received at the hands of the defendant.

Various requests were made to charge, all of which were covered by the general charge of the court.

The jury found the defendant guilty of voluntary manslaughter and recommended him to the mercy of the court.

A motion for a new trial was made, upon the ground that the court erred in ruling the juror, Barry, competent, in the above stated exclusion of the testimony of Harbuck and Wood, and upon other grounds not material here. The motion was overruled and the defendant excepted.

GATRELL & STEPHENS; A. W. HAMMOND; WRIGHT & HILL, for plaintiff in error.

JOHN T. GLENN, solicitor general, for the state.

TRIPPE, Judge.

1. Though the juror's name was spelled *Barry* he was generally called *Berry*. The name on the list furnished the defendant was the name by which the juror was generally known. Independent of the doctrine of *idem sonans*, it does not appear that the defendant could have been misled or injured. No showing was made that such was the result of misspelling the juror's name on the list furnished him. He had the very name by which the juror was known, and the mere fact that the letter "a" should have been in the place of "e" was not sufficient ground for a challenge either to the juror individually or to the array. Besides, "*Hutson*" and "*Hudson*," "*Herman*" and "*Harman*," have been held respectively to be *idem sonans*: 18 *Georgia*, 738; 3 *Ibid.*, 266. There is as little difference between "*Barry*" and "*Berry*."

2. The sayings of Clifton, the deceased, were not part of the *res gestæ*. The declaration offered to be proved by Harbuck, was at a time after the rencounter which is not exactly given in the evidence. But the rencounter was over, all

parties had left the scene, Clifton had been carried some two hundred and fifty yards, had fainted and was taken off the wagon and laid by the roadside. After camphor had been procured from a house near by, and used on him, he made the statement proposed to be put in evidence. Had the state offered to prove what Clifton then said as evidence against the defendant, scarcely a doubt could exist as to its being inadmissible. It would not be claimed as being part of the *res gestæ*. Is the rule different when defendant offers to prove it? This is not a case of Clifton against the defendant, but a prosecution by the state for a violation of her criminal law. Statements or admissions made by a party are admitted against himself. But, though he may have been the person assaulted, or upon whom an offense was committed, his sayings afterwards are not competent either for or against the one who is prosecuted for the crime, unless they are so connected with the transaction as to constitute a part of the *res gestæ*. There was no such connection in this case. That which was proposed to be proved by the witness, Wood, occurred probably a week or more after the wound was given. Nor was it proved that what was heard by either of these two witnesses, was uttered by Clifton *in articulo mortis*. Nothing appears to show that he thought he would die. Even had they been so uttered, they amounted to nothing more than opinions. No fact connected with the killing was stated: 22 *Georgia*, 478; 38 *Ibid.*, 58. In the first of these two cases it was proposed to prove a declaration of the deceased almost identical in import with what it was offered to show Clifton said. The evidence was rejected on the trial and the ruling affirmed by this court.

3. Upon the other exceptions it is sufficient to say, the charge of the court fully covered all the provisions of the Code and the points in the requests of defendant's counsel which were applicable to the case.

Judgment affirmed.

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ISAIAH ARNOLD, plaintiff in error, *vs.* THE STATE OF GEORGIA, defendant in error.

To sustain the charge of marrying the wife of another, it is necessary to establish the marriage either by the record thereof, or by the admission of the defendant, or by the testimony of some one who saw the ceremony performed, or by such other evidence as will clearly establish the fact. It must also be shown that the defendant knew, at the time of the marriage, that the woman was the wife of another.

Criminal Law. Marrying the wife of another. Before Judge STROZER. Mitchell Superior Court. May Term, 1874.

H. MORGAN, by R. H. CLARK, for plaintiff in error.

B. B. BOWER, solicitor general, for the state.

WARNER, Chief Justice.

The defendant was indicted in the county of Mitchell for "marrying the wife of another," and on the trial thereof was found guilty by the jury. A motion was made for a new trial, on the ground that the verdict was contrary to the evidence and without evidence, contrary to law and the charge of the court, and because the court erred in charging the jury "that the living together as man and wife of the defendant and the woman charged to be the wife of another, was an admission of marriage," when such evidence did not prove the consummation of the marriage in Mitchell county. The court overruled the motion for a new trial, and the defendant excepted. The 4532d section of the Code declares that "if any man or woman, being unmarried, shall *knowingly* marry the wife or husband of another person, such man or woman shall, on conviction, be punished by imprisonment and labor in the penitentiary for any time not less than one year nor longer than three years." The offense with which the defendant was charged consists in marrying Malinda, the wife of Sam. Thomas, *knowing* that she was his wife. On the

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trial of criminal cases of this description, the marriage of the defendant to the wife of another should be proved, either by the record of his marriage or by the admission of the defendant as to the fact of his marriage, or by the testimony of some one who saw him married, or by such other competent evidence as will clearly and satisfactorily establish the fact of his marriage, as alleged in the indictment. General reputation or report that he was married is not sufficient to authorize a conviction. The fact that he was actually married to the wife of another must be proved. It must also be proved that the defendant *knew* at the time he married Malinda Thomas that she was the wife of Sam. Thomas. The evidence in the record is not sufficient, in our judgment, under the law, to prove the fact of the marriage of the defendant to Malinda Thomas, nor does the evidence establish the fact that the defendant *knew* that she was the wife of Sam. Thomas at the time of the alleged marriage, and therefore the verdict was contrary to law. In the view we have taken of this case we express no opinion whether the alleged marriage was consummated in Mitchell county, under the evidence in the record, or not.

Let the judgment of the court below be reversed.

WILLIAM J. WHITEHEAD, administrator, *et al.*, plaintiffs in error, *vs.* **ROBERT C. PARK** *et al.*, defendants in error.

1. A testator, by the fourth item of his will, bequeathed and set apart eighty shares of railroad stock "for the purpose of educating" his three minor children, and directed "that they be boarded and educated out of the same until they receive a thorough classical education, if they have sufficient capacity for the same." After making specific bequests of other portions of his property, the testator, in the twelfth item, directed an equal division of the balance of his estate to be made between eight of his children—mentioning their names, and including, amongst them the three minors—adding thereto the following clause: "And when my youngest child becomes of age, the balance remaining of the railroad stock to be equally divided among the last named

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children or their representatives." There were eleven children in all, who were beneficiaries under the will:

Held, that the minor children did not take an absolute estate in the railroad stock.

2. The children mentioned in the twelfth item are entitled, when the youngest child becomes of age, to the balance remaining of said stock; and parol evidence is not admissible to show that the testator intended to give it exclusively to the three minors.
3. The three minor children were to be educated as directed in the fourth item; and during the time necessary for acquiring such education, were to be supported and maintained out of said stock. If they did not receive such education and support, they are respectively entitled to have out of the balance of the stock remaining, when the youngest reaches twenty-one, such sum as would have been necessary to have completed whatever education each may have received up to the standard specified in the will, and to have maintained such minor during the time which would have been required to be so educated; and such sums should be paid before the division mentioned in the last clause of the twelfth item is made.

Wills. Evidence. Before Judge RICE. Jackson Superior Court. August Term, 1874.

To report this case would simply be to repeat the facts set forth in the above head-note.

B. H. HILL & SON, for plaintiffs in error.

J. J. FLOYD; S. P. THURMOND; COBB, ERWIN & COBB, for defendants.

TRIPPE, Judge.

1. Had there been no further provision made by the testator in relation to the railroad stock than what is contained in the fourth item of the will, the three minor children's claim to the whole of it would have been different. But there can be no doubt as to the meaning of the last clause of the twelfth item. It expressly provides that when the youngest child arrives at age the balance of the railroad stock remaining should be equally divided between eight of the children, mentioning their names, among whom are the three minor chil-

dren. It is clear that the minor children's interest in the stock was limited, and they did not take the whole.

2. The direction that the eight children mentioned in the twelfth item were all to share in such balance is too clear and explicit to admit of a doubt. There is no ambiguity in it. Nor is there anything for parol testimony to explain. It might, if admitted, contradict the plain terms of the will. A witness might testify that testator's intention was directly contrary to what was written—that he did not mean to give the balance of the stock to those to whom it was given, but only to three of them. We apprehend that on an issue raised as this is, no case can be found where such testimony was admitted: 3 *Georgia*, 557; 8 *Ibid.*, 37; 12 *Ibid.*, 156; 46 *Ibid.*, 247, 252.

3. Another question was presented to-wit: whether those children who did not receive the benefit provided for them through the means of this stock, can now claim from the stock remaining, an equivalent for that they did not thus enjoy. They were to be educated, and during the time necessary for acquiring such education, were to be supported and maintained out of said stock: 28 *Georgia*, 369; 19 *Ibid.*, 127. Some of them did not have this education or support. In *Barton vs. Cooke*, 5 Vesey, 462, the testator directed his executors to apply "£100 for the board and education of James Barton until he was fit to be put out as an apprentice, and then they should pay the further sum of £100 as an apprentice fee." James attained the age of nineteen, but had not been placed out as an apprentice. Lord ALVANLY held that he was entitled to the legacies, saying, "if a legacy be given for the benefit of an infant one way, and it cannot be so applied, it may be applied for his benefit in another." A similar decision was made in *Nevill vs. Nevill*, 2 Vernon, 431, and in *Barlow vs. Grant*, 1 *Ibid.*, 255. See, also, *Sidney vs. Vaughan*, 2 Bro. Parl. Cas., 254. According to this principle, which is fair and just, these minors, if they did not receive the education and support provided for them, are entitled to have respectively out of the balance of the stock remaining when

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the youngest attains twenty-one, such sum as would have been necessary to have completed whatever education each may have received, up to the standard specified in the will, and to have maintained such minor during the time which would have been required to be so educated. This will be no difficult matter to ascertain, and it is justice, and we think in accordance with principle and authority. On this point we are of opinion that there was error, and reverse the judgment.

Judgment reversed.

LAURA F. FENN, plaintiff in error, vs. THE NEW ORLEANS
MUTUAL INSURANCE COMPANY, defendant in error.

1. An interest in property insured which was slight or contingent, legal or equitable, but which was so represented to an insurance company at the time the contract was made, is sufficient to sustain the same, and to authorize a recovery in case of loss.
2. As a general rule, this court will not interfere to control the exercise of the sound discretion of the presiding judge in granting one new trial before another jury, unless that discretion has been manifestly abused.

Insurance. Contracts. New trial. Before Judge HOPKINS. Fulton Superior Court. October Term, 1874.

For the facts, see the decision.

R. H. CLARK; W. F. WRIGHT, for plaintiff in error.

THRASHER & THRASHER, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant on a fire insurance policy to recover damages to the property insured for the alleged loss sustained by the plaintiff. On the trial of the case, the jury found a verdict for the

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plaintiff for \$1,177 44, principal, and \$78 49 for interest. The defendant made a motion for a new trial on the ground that the verdict was contrary to the charge of the court, contrary to law and the evidence, and without evidence to support it. The court granted a new trial, and the plaintiff excepted.

1. The property insured was household and kitchen furniture, wearing apparel and other articles specified in the policy, being in a certain described dwelling-house mentioned in the policy of insurance, of the value of \$2,500 00. The dwelling-house was burned, and the main question on the trial was, how much of the property covered by the policy was in the house at the time of its destruction by fire. If the plaintiff had some interest in any or all of the property insured, although that interest may have been slight or contingent, legal or equitable, and that interest was fairly represented and made known to the defendant, or its agent, at the time the contract of insurance was made, it is sufficient to sustain the contract, and to entitle the plaintiff to recover in case of loss.

2. By the 3713th section of the Code, it is declared that "in any case where the verdict of a jury is found contrary to evidence and the principles of justice and equity, the presiding judge may grant a new trial before *another* jury." The power conferred in this section to grant, at least, one new trial before *another* jury, where the verdict is contrary to evidence, and the principles of justice and equity, is broad and comprehensive. In the exercise of this power, the presiding judge must necessarily have a discretion. By the 3717th section, it is declared that "the presiding judge may exercise a sound discretion in granting or refusing new trials in cases where the verdict may be decidedly and strongly against the weight of evidence, although there may appear to be some slight evidence in favor of the finding." By the 3713th section, the presiding judge has the power to grant a new trial in any case before *another* jury, when the verdict is contrary to evidence and the principles of justice and equity. By the 3717th

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section, the presiding judge may exercise a sound discretion in granting or refusing a new trial in cases where the verdict may be decidedly and strongly against the weight of the evidence. Whether the presiding judge granted the new trial in this case on the ground that the verdict was decidedly and strongly against the weight of the evidence, or whether he granted it on the ground that the verdict was contrary to evidence *and* the principles of justice and equity, does not appear in the record affirmatively, but he had the power, under the law, to exercise his discretion in granting the new trial on both or either of those grounds, and this court will not control that discretion unless it has been manifestly abused, which it has not, in our judgment, in this case. To fully give our reasons for thinking so would necessarily involve an expression of opinion in relation to the evidence in the record, and as there is to be a new trial before another jury, we decline to do so. As a *general rule*, this court will not interfere to control the exercise of the sound discretion of the presiding judge in granting one new trial before *another* jury, unless that discretion has been manifestly abused.

Let the judgment of the court below be affirmed.

FRANKLIN, REID & COMPANY, plaintiffs in error, *vs.* JAMES C. NEWSOM *et al.*, defendants in error.

1. A purchaser of land is bound to inquire into the right of one in possession thereof, and such possession charges the purchaser with notice of that claim of right.
2. Whilst it is a general rule that the right to specific performance is in the sound discretion of a court of equity, yet, in this state, that power is to be exercised by the jury under the evidence and charge of the court.
3. Q. bought land from C., paying part of the purchase money and taking bond for titles. He sold part of the land to L. who was in possession, and who paid the price agreed on for his purchase. F. R. & Co., who were creditors of Q., in order to get the title from C., advanced the unpaid balance of the purchase money to C., under an agreement with

Q., that they should take the title to themselves as a security for such advance and also for their original claim on Q. On paying this balance, C. executed the title to Q. who made a deed to F. R. & Co. for the whole land.

Held, that F. R. & Co. stand in the place of C., with the right which he had as to holding the whole land subject to his claim for the unpaid purchase money. And to enforce this right in a suit in equity between them and L., or between them and N., a purchaser from L., they may have a decree to sell a portion of the land which was not sold by Q., and if that be not sufficient to discharge what they have advanced of the purchase money to C., then that the balance so sold to L. and N., be liable for the unpaid portion of such advancement.

4. The question of fraud on the part of N., the purchaser from L., was distinctly left by the court to the jury, and it was not error for the court to decline to charge—that if N. paid for the land when he bought from L., partly with property belonging to F. R. & Co., then it was a fraud on them, it appearing that they only held a mortgage on such property, and there being nothing to show that their lien was thereby lost, or could not be enforced against it.

Vendor and purchaser. Possession. Notice. Equity. Specific performance. Lien. Fraud. Before Judge POTTLE. Wilkes Superior Court. November Term, 1874.

The above head-notes report this case.

R. TOOMBS, for plaintiffs in error.

W. M. & M. P. REESE, for defendants.

TRIPPE, Judge.

1. The rule that a purchaser of land is bound to inquire into the right of one in possession thereof, and that such possession charges the purchaser with implied notice of that claim of right, is too firmly established to be now denied: 48 *Georgia*, 585; 25 *Ibid.*, 55; 26 *Ibid.*, 132, 19 *Ibid.*, 337. It was claimed that this case was an exception to this rule, because at the time Lane bought from Quisenby, he, Lane, was in possession as Quisenby's agent or superintendent, and there having been no visible change of possession, the doctrine of implied notice would not arise. In the first

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place, it might be replied, that Newsom is the claimant of the land, and he purchased from Lane, and went himself into possession before the deed to Franklin, Reid & Company was executed. Both Lane and Newsom had put improvements on the land and Newsom was in possession when plaintiffs in error got their deed. In *Matthews vs. Demeritt*, 22 Maine, 312, it was held, that the visible possession of an improved estate, even if no visible change of possession takes place at the time of the conveyance, is implied notice of the sale to subsequent purchasers, although the first purchaser's deed was not recorded. There was an exception recognized to this rule, to-wit: when the second purchaser is proved to have known that the first purchaser was in possession without claiming title before he bought, or where, from the circumstances, such knowledge must be presumed. The exception is a reasonable and proper one, but this case does not come within it. Had Franklin, Reid & Company known that Lane was in, not claiming title when he bought, or such facts existed as to cause such a presumption, then they would not be controlled by the general rule so far as Lane was concerned. But nothing of that sort appears. True, he was the son-in-law of Quisenby. But he had put valuable improvements on the land, advised with Calloway, the holder of the title, about buying it; nothing was kept secret, did buy and pay for it; sold it to Newsom for other land Newsom had, and exchanged possession with the latter. In *Webster vs. Maddox*, 6 Greenleaf, 256, the same doctrine was held. There was no visible change of possession when the deed was executed to the tenants; and their possession, though their deed was not recorded, was decided to be sufficient notice of their title. It is true, there was no deed to either Lane or Newsom, but each held a perfect equity against Quisenby, the vendor of Franklin, Reid & Company.

2. There is no doubt that the general rule is, that the right to a specific performance is in the sound discretion of a court of equity. In this state, that power is to be exercised by the jury under the evidence and charge of the court.

Where the evidence and the rules of law justify such a decree, a party has the right to claim it.

3. The title to the whole land was in Calloway, both to the part sold to Newsom and the portion retained by Quisenby. Franklin, Reid & Company advanced the unpaid portion of the purchase money in behalf of Quisenby to Calloway, and were to take the title for their security. In execution of this agreement, Quisenby made a deed to them to all the land. This put them in the place of Calloway, with the right he had as to holding the whole land subject to his claim for the unpaid purchase money. To enforce that right they may have a decree to sell the portion of the land which was not sold by Quisenby; and if that be not sufficient to discharge what they have paid of the purchase money to Calloway, then that the balance so sold to Lane and Newsom be liable for the unpaid portion of such advancement. As the decree did not allow, under any circumstances, the claim of plaintiffs in error to be asserted against that part of the land, it should be modified or a new trial had. The judgment rendered will contain directions on this point.

4. The court refused to charge as requested by plaintiffs in error, that if when Newsom bought from Lane he paid for the land in part with property belonging to them, it was a fraud, and gave as a reason why the request was refused, that Franklin, Reid & Company only held a mortgage on such property. The question of fraud on the part of Newsom was distinctly submitted to the jury by the court. The testimony touching it, and as to Newsom having sent cotton to be shipped to plaintiffs, need not be stated. All was before the jury. Nothing appeared to show that the mortgage lien was not yet good against the property, or that it could not be enforced.

As indicated, the judgment is reversed, and the case remanded with directions.

Fort vs. West et al.

JAMES A. FORT, plaintiff in error, *vs.* JAMES P. WEST *et al.*,
administrators, defendants in error.

1. That the defendant married the sister-in-law of the judge's wife, does not disqualify the latter from presiding.
2. Where suit is brought on a note given for the purchase money of land, a plea to the effect that the widow of the vendor claimed dower in the property sold which had not been set apart, and that the defendant would not be protected in paying said note as the title would be imperfect, was properly stricken on demurrer.
3. The defendant not residing in the county in which the suit was pending, it was not error to refuse his counsel time to procure his affidavit to an amended plea, as the oath of such attorney would have been sufficient.

Judge. Dower. Vendor and purchaser. Pleadings. Attorneys. Before Judge CLARK. Sumter Superior Court. April Term, 1874.

A report of this case is unnecessary.

ALLEN FORT; HAWKINS & HAWKINS, for plaintiff in error.

JACK BROWN; C. T. GOODE; COOK & CRISP, by brief, for defendants.

WARNER, Chief Justice.

1. This was an action brought by the plaintiffs against the defendant on a promissory note for \$2,000 00. On the trial of the case, the defendant objected to Judge Clark's presiding, because he was related by affinity to the defendant within the fourth degree. It appears from the record, that the defendant married the widow of A. W. Williams, who was the brother of Judge Clark's wife, and that Williams died after Judge Clark's intermarriage with his sister. In our judgment, Judge Clark was not disqualified from presiding in the case, under the provisions of the 205th section of the Code: *Deupree vs. Deupree*, 45th Georgia Reports, 414; *Hubback on Succession*, 276; 12th Petersdorf's, Ab., 565.

2, 3. There was no error in sustaining the demurrer to the defendant's plea, or in refusing to give him time to make oath to his amended plea, as he lived in Stewart county. By the 3449th section of the Code, when the defendant does not reside in the county in which the suit is pending, the agent or attorney at law of the defendant may make oath to his plea, which the defendant's attorney could have done in this case. From the facts disclosed in the record, we fear the defendant was more anxious to gain *time* than to obtain *justice*, but as damages have not been claimed, we do not award any.

Let the judgment of the court below be affirmed.

OLIVER H. JONES, plaintiff in error, vs. ALBIN SONS & COMPANY, defendants in error.

One who makes a conditional sale does not lose his rights under the contract because his attorney, in ignorance of its terms, takes a mortgage on the property from the purchaser to secure an unpaid part of the purchase money, especially when it does not appear that the contesting creditors of the purchaser acted upon or were misled by the fact of the mortgage being taken, or that there was fraud on the part of the seller, and it further appearing that the full value of the article so sold was allowed by the seller when he retook possession, and that even if he were forced to rely on the mortgage, it was for an amount greater than the value of the property, and had priority over the liens of such creditors.

Debtor and creditor. Mistake. Lien. Attorney. Mortgage. Before Judge HOPKINS. Fulton Superior Court. March Term, 1874.

This was a claim case arising in the justice's court for the one thousand and twenty-sixth district of Fulton county. Albin Sons & Company were the plaintiffs in *fi. fa.*, Charles R. Groomes, the defendant, and Oliver H. Jones, the claimant. The plaintiffs introduced in evidence three *fi. fas.* in favor of Albin Sons & Company against Charles R. Groomes,

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two of which were for \$100 00 each, and the third for a less amount, with the entries thereon, showing a levy of each upon a hearse. The three cases were tried and disposed of together. The claimant admitted that the judgments on which said *fi. fas.* were issued were rendered in said justice's court, the first two on the 10th September, 1873, and the last on the 5th September, 1873, and that at the date of said judgments Charles R. Groomes was in possession of said hearse. Plaintiffs closed, and the claimant introduced W. R. Hammond, who testified in substance as follows: About the 17th June, 1873, W. M. Raymond & Company sent to his firm (D. F. & W. R. Hammond) for collection, four notes on Groomes & Reece, three for \$100 00 each, and one for \$124 75, with instructions to do the best they could with them. Said notes were for the balance of the purchase money for said hearse, which had been previously delivered to Groomes & Reece under a contract that the title was not to pass until paid for. All the purchase money for said hearse had been paid except the four notes aforesaid. On the 18th of June, 1873, D. F. & W. R. Hammond, not having in their possession said written contract, or knowing of the same, accepted from C. R. Groomes a mortgage, as well upon the said hearse as upon his stock in trade, to secure the said four notes, and also another demand of about \$1,200 00 which they held for said Raymond & Company against Groomes. Shortly after accepting said mortgage—two or three days—Raymond & Company sent to witness, by mail, said written contract, and witness immediately replied that he would not have taken a mortgage upon the hearse if he had known its nature. He received no special reply from W. M. Raymond & Company. In August, 1873, said mortgage was foreclosed. Subsequently, the claimant, who held a mortgage on said hearse and other property against said Groomes, had the same foreclosed and levied, and advertised said hearse for sale. Witness then went to claimant and showed him the written contract and threatened to interfere and stop the sale as to the hearse. Claimant, after negotiating with witness, paid him \$400 00; \$375 00

of this was for the said hearse, which witness, as the attorney of said Raymond & Company, then and there sold to him. Before making said sale, witness examined said hearse carefully, and found that it had been badly broken. The claim of said Raymond & Company for the balance due upon the hearse was \$424 75, but witness took \$375 00 for it, because he thought that was all it was worth in its then damaged condition; sold it for Raymond & Company under and by virtue of the written contract in evidence. The other \$25 00 was paid on account of the balance of the mortgage indebtedness. Witness executed to claimant, on the back of said mortgage *fi. fa.*, a transfer of the same, and also of the right, title and interest of Raymond & Company in and to the hearse.

The claimant testified as follows: He held a mortgage on said hearse against Groomes, and on all the rest of his store property, except a few small things. This mortgage was taken prior to June 18th, 1873, and at that time he did not know of the conditional sale. After he foreclosed his mortgage, he ascertained that Groomes lacked \$375 00 of paying up the purchase money, and by agreement with Groomes, he paid up the balance due and took a bill of sale directly to himself. The hearse had been broken, and cost, subsequently, \$157 00 to repair it. Witness does not think it was worth, at the time he purchased, more than the amount he paid for it.

A. T. Finney testified: That since Jones bought the hearse he had it repaired for him at the cost of \$157 00. At the time he took it for repair, it was not worth over \$400 00. Its value will not exceed \$800 00. As repaired and on sale in his shop, it would not bring more than one-fourth of its original cost.

The justice held the property not subject. On a writ of *certiorari* thereto the decision was reversed and claimant excepted.

D. F. & W. R. HAMMOND, for plaintiff in error.

SIDNEY DELL, for defendants.

Linton *vs.* The Mayor and Council of the City of Athens.

TRIPPE, Judge.

It was not denied on the argument of this case that the contract between Raymond & Company and Groomes & Reece for the hearse, was nothing more than a conditional sale, and that the title was not to pass until it was paid for. But defendants in error claim that as the attorneys of Raymond & Company took a mortgage on the hearse to secure the unpaid purchase money, they are estopped from denying the title of Groomes & Reece. This mortgage was taken by the attorneys in ignorance of the terms of the contract of sale. It does not appear that the other creditors of Groomes & Reece acted upon, or were misled by the fact that the mortgage was taken. When the agent of Raymond & Company took back the property, he allowed the full value of it, and nobody could have been damaged by the transaction. Moreover, the mortgages of Raymond & Company, and of Jones, the claimant, on this identical property, are both older than the judgments of the defendants in error, and have a priority over those judgments. Under these facts, we think the judgment of the justice court in holding the property not subject was right, and it was error to sustain the *certiorari* and to set that judgment aside. The doctrine of estoppel does not apply to this case.

Judgment reversed.

JOHN S. LINTON, plaintiff in error, *vs.* THE MAYOR AND COUNCIL OF THE CITY OF ATHENS, defendant in error.

1. The question of taxation is one of power, and the exercise of it is vested in the law-making department of the government, and when that department has exercised its judgment in relation to the assessment of taxes, the courts have no power to interfere on the ground that the tax is unfair or unjust, unless the fundamental law of the land has been violated.

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2. That land located within a municipal corporation was used for agricultural purposes, and the owner derived no benefit from the city government, was no ground to enjoin the collection of the taxes assessed by the municipal authorities, especially where such owner purchased said property after the corporate limits had been extended so as to cover the same.

Taxes. Constitutional law. Municipal corporations. Before Judge RICE. Clarke Superior Court. August Term, 1874.

This case is reported in the decision.

SPEER & THOMAS, for plaintiff in error.

Private property not taken for public use without compensation. Taxation on agricultural lands for corporate purposes should be enjoined: Buell vs. Ball, 20 Iowa, 288; Bradshaw vs. City of Omaha, 1 Nev., 16; City of Henderson vs. Lambert, 8 Bush., 610; Fulton vs. City of Davenport, 87 Iowa, 405; Morford vs. Anger, 8 Iowa, 82; Chaney vs. Hooser, 9 B. Mon., 330; Deedy vs. Lambon, 26 Iowa, 419; Gillette vs. City of Hartford, 31 Conn., 351; 2 Dillon on Mun. Corps., 633; Cooley on Lims., p. 504.

COBB, ERWIN & COBB; S. P. THURMOND; T. W. RUCKER, for defendant.

1st. Constitutional provision as to exercise of right of eminent domain has no application to this case: Sedg. on Cons. and Stat. Law, p. 498, *et seq.*; Dwarris on Stat., p. 403, *et seq.*; 4 N. Y., 432; Cooley's Cons. Lims., pp. 497, 498.

2d. General assembly authorized to pass such law: Cons. of 1868, par. 1, sec. 1, art. 3; par. 1, sec. 5, art. 3.

3d. Courts cannot control discretion of legislature: Frederick vs. Mayor and Council of Augusta, 567; 4 N. Y., 432; Cooley's Cons. Lims., pp. 513, 164, 168, 171.

WARNER, Chief Justice.

This was a bill filed by the complainant against the defendant, praying for an injunction to restrain the collection of

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a tax execution issued by the defendant against the complainant's property, on the ground that the tax is illegal. When the motion for an injunction came on to be heard, the defendant demurred to the complainant's bill for want of equity. The court sustained the demurrer, and the complainant excepted.

1. The complainant alleges that he is a farmer by occupation, and in order to carry on said occupation he, many years ago, purchased a valuable tract of land in the county of Clarke, situated about one mile and a half from the centre of the city of Athens, and is now engaged in the occupation of said land solely for agricultural purposes; that in 1815 the corporate limits of the town of Athens were extended one mile in every direction from the college chapel; that in 1842 the limits of said town of Athens were extended to prevent the sale of liquors and establishment of lewd houses in close proximity to Franklin College, situated in said town, and not for the purpose of increasing the municipal revenue; that in 1872 the general assembly passed an act amending the charter of the town of Athens, making it a city, the authority and jurisdiction of which was extended a distance of two miles in every direction from the college chapel. It will be noticed that the complainant does not allege in his bill what distance from the college chapel the act of 1842 extended the corporate limits of the town, but by reference to that act it appears that the corporate limits of the town were extended by it two miles from the college chapel, and the act of 1872 does not extend the limits of the city of Athens any further than the corporate limits of the town of Athens were extended by the act of 1842; nor does the complainant allege at what time he purchased the land, but it was conceded on the argument that he purchased it subsequent to the year 1842. The complainant alleges in his bill that he is annually subjected to the payment of a tax of \$99 10 on his land by the municipal corporation, without deriving any benefit therefrom, as no part of his land is required for streets or houses, or any other purpose connected with the municipal organization of the city of

Athens, but is used by him exclusively for agricultural purposes, and that the result of the imposition of said tax on his land is to take his private property for public use without any compensation whatever, and therefore the law which imposes the tax upon his land within the corporate limits of the city, is unconstitutional and void. The power of taxation is vested in the sovereign authority of the state; no constitutional government can exist without it; its exercise is essential to the very existence of the state government. As was said by Chief Justice MARSHALL, in the case of *The Providence Bank vs. Billings*, 4 Peters' Reports, 561: "It resides in the government as part of itself, and need not be reserved where property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of any individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the legislature. This vital power may be abused; but the interest, wisdom and justice of the representative body, and its relations with its constituents, furnish the only security against unjust and excessive taxation, as well as against unwise taxation." By the constitution of this state, the power of taxation over the whole state shall be exercised by the general assembly only to raise revenue for the support of government, to pay the public debt, to provide a general school fund, for common defense, and for public improvements; and taxation on property shall be *ad valorem* only, and uniform on all species of property taxed. The general assembly may grant the power of taxation to the county authorities and municipal corporations, to be exercised within their several territorial limits. There is no pretense that the land of complainant, which is taxed, is not within the territorial limits of the municipal corporation, and that it was within those limits when he purchased it, or that the rate of taxation is greater than is authorized by the charter of the city, or that it has not been assessed upon the *ad valorem* and uniform principle as required by the constitution; but the complaint is, that inasmuch as he has no use for the municipal organ-

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ization, and inasmuch as it is of no practical benefit to him there, fore, to tax his land \$90 00 a year for the benefit of the corporation, is taking his private property for public use without compensation, and therefore the law which authorizes the assessment and collection of the tax on his land within the limits of the corporation, is unconstitutional and void. Tax laws, as well as all other general laws, sometimes operate harshly in individual cases, and we suppose always will, owing to the imperfection of human legislators. A man living within the limits of a municipal corporation, of large property, who has no children to educate, might think it hard and unjust that his property should be taxed to raise a school fund to educate other people's children. So a man living within the limits of a municipal corporation, who had no use for a street railway, might think it hard that his property should be taxed to build one.' In these cases, and many others which might be cited, the individuals whose property might be taxed would have no more personal interest in the special object for which the tax was levied than the complainant has in the municipal corporation of the city of Athens and its organization. The question of taxation is one of power, and the exercise of it is vested in the law-making department of the government, and when that department has exercised its judgment in relation to the assessment of taxes, the courts have no power to interfere on the ground that the tax is unfair or unjust, unless the fundamental law of the land has been violated. The collection of all taxes is, in a certain sense, the taking of private property for the use of the public, and the case made by the complainant does not constitute an exception to the general rule. Taxing his property within the limits of the city for the benefit of the municipal corporation is no more taking private property for the use of the public than the taxing of a man's property, who had no children, to raise a fund for the education of other people's children within the corporate limits of the city, would be the taking of private property for the use of the public. It is nothing more than the exercise of the sovereign authority of the state—its legislative will

upon the subject of taxation—an inherent power which belongs to the state. It is true that this general power of taxation may be abused by the law-making power of the state, but the remedy for such abuse is in the vigilance of the people over the conduct of their representatives in making extravagant expenditures and taxing the people for the payment thereof.

2. By the constitution, the general assembly of this state have power to make all laws and ordinances, consistent with the constitution, and not repugnant to the constitution of the United States, which they shall deem necessary and proper for the welfare of the state. In 1842, the general assembly deemed it necessary and proper to extend the corporate limits of the town of Athens two miles in every direction from the college chapel. Whether this was done for the benefit of Franklin College, or for other reasons satisfactory to the law-making power, it is not material to inquire. In 1872, the general assembly, in amending the charter, confirmed the extension of the corporate limits of the city as the same existed by the act of 1842. The act of 1872 did not extend the limits of the corporation so as to embrace more territory than was included by the act of 1842. By the act of 1872 the mayor and council of the city of Athens had full power and authority to levy and collect an annual tax of not exceeding one per centum upon the value of all the property within the corporate limits of said city, of whatever kind, real or personal, which is or may be subject to taxation by the laws of this state. The complainant's land was within the corporate limits of the town of Athens when he purchased it, and is now within the corporate limits of the city of Athens under the amended charter. It is not pretended that the tax assessed on the land is more than one per centum on its value, or that the land is not within the corporate limits of the city; yet, this court is asked to declare this law imposing the tax on the complainant's land unconstitutional and void, because he has no use for the corporation, and it is of no benefit to him, and to require him to pay the tax in obedience to the laws of the state, will be to take his private property for the use of the public without

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compensation. The reply is, that the sovereign authority of his state has declared by her constitutional legislative enactment that she deems it necessary and proper for her welfare, that he should pay the tax assessed upon his land, and therefore, it is his duty, as one of her citizens, to pay it, whether in his judgment he will be benefited by its payment or not. If each individual tax-payer should refuse to pay the tax imposed upon his property by the sovereign authority of the state because, in his judgment, he would not be benefited by its payment, there would not be much tax money collected. Several cases decided in some of the western states of the union, were cited on the argument by the plaintiff in error. The principle decided in those cases is, that, although the courts do not hold the legislative enactment imposing taxes to be absolutely void, but only hold that the courts have the power to limit the exercise of the taxing power of the state, when, in their judgment, upon a given state of facts, the individual whose property is taxed derives no benefit from the object for which the tax is imposed, then they will enjoin the collection of such taxes. In other words, the practical effect of those decisions is, for the courts of the state to assume and decide what taxes are necessary and proper for the welfare of the state, instead of the legislative department of the state government. Cooley on Constitutional Limitations, 501, after citing several of those cases, remarks, in a note, that "it would seem as if there must be great practical difficulties, if not some of principle, in making this disposition of such a case." In *McCullock vs. Maryland*, 4 Wheaton's Reports, 430, Chief Justice MARSHALL said: "It is unfit for the judicial department to inquire what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power." By the constitution of this state, the legislative, executive, and judicial departments, shall be distinct, and each department shall be confided to a separate body of magistracy. No person or collection of persons being of one department shall exercise any power properly attached to either of the others, except in cases herein expressly provided. It follows, therefore, that

in this state, at least, inasmuch as the power to levy and collect taxes is vested in the general assembly, that it would, in the language of Chief Justice MARSHALL, be *unfit* for the judicial department of the state government to inquire whether the law-making power of the state has acted wisely or unwisely, justly or unjustly, in taxing the property of the complainant as set forth in the record. The principle involved in the case now before us, was decided in the case of *Frederick vs. The City Council of Augusta*, 5th Georgia Reports, 561. In that case, this court held "that when the law-making power acts within the scope of its delegated authority, the courts cannot interfere. It is the duty of the judicial tribunals of the country to *execute* and *enforce* all *constitutional* laws, and not to *make* them. The remedy against the effect of oppressive legislation, delegated to municipal corporations, is in the hands of the people or their representatives." But the argument for the plaintiff in error, in the case now before us, as we understand it, is, that the tax upon the complainant's property is *not* unconstitutional, because it is unjust and oppressive, but as the municipal corporation of the city of Athens, which he is taxed to maintain, is of no benefit to him, it is unjust and oppressive to compel him to pay a tax on his property for its support, and therefore the law which compels him to do so *is unconstitutional*, because it take his property for the use of the public without compensation. The reply is, that the taxation of property within the corporate limits of the city of Athens, was a question for the legislative department of the government to decide, and not a question for the courts. We find no error in sustaining the demurrer to the complainant's bill.

Let the judgment of the court below be affirmed.

The Western and Atlantic Railroad Company *vs.* Camp.

THE WESTERN AND ATLANTIC RAILROAD COMPANY, plaintiff in error, *vs.* **LOUIS CAMP**, defendant in error.

1. When it does not appear that goods transported by railroad have remained an unreasonable time in the depot of the railroad company after they have reached their destination, and the agent of the consignee, on the ensuing Saturday, inquired of the agent of the company whether the goods must then be taken out or could they remain until the next Monday, and whether there would be additional charges therefor, and the agent of the company replied that the goods could be taken out on Monday without further cost, the rule of liability on the company, which was then that of ordinary diligence as warehousemen, was not thereby changed.
2. When the general charge to the jury was correct, and substantial justice has been done by the verdict, this court will not interfere, although there may have been some error committed in the refusal to charge as requested by the losing party, provided such request, if it had been given, would not probably have affected the result.
3. This court will not undertake to reverse a judgment refusing a new trial, when the interrogatories of several witnesses were read on the trial, and were considered on the hearing of the motion for a new trial, which are not contained in the record, and it does not appear that they were immaterial and could not affect the judgment, or were omitted by consent of parties.

Railroads. Warehousemen. Diligence. Charge of Court. New trial. Practice in the Supreme Court. Before Judge McCUTCHEN. Catoosa Superior Court. July Term, 1874.

Camp brought complaint against the Western and Atlantic Railroad Company for \$430 00, the value of goods shipped to him, and burned in the depot of the defendant on February 10th, 1873. The defendant pleaded the general issue.

The plaintiff proved the shipment of the goods, their non-delivery, and that they were directed to "L. Camp, care of R. J. Jones, Ringgold, Georgia."

R. J. Jones testified that he called at the depot several times for the goods, but they had not arrived; that on Tuesday or Wednesday of February court, 1873, defendant's agent told him the goods had come on that morning; that the depot was burned on the Monday night following; that he in-

formed the agent that he would notify the plaintiff of the arrival of the goods, who replied that he wished he would; that he did not pay the freight, nor was it demanded from him by the agent; that he saw the depot burning about ten or eleven o'clock at night on February 10th; that the wind was blowing from the southeast; that the railroad track was about fifteen feet from the depot, trains passing thereon frequently, both day and night; that the roof of the depot was old, made of oak boards, and had been there eight or ten years; that the boards were rotten, some of them warped; that the roof leaked in some places; that the smoke-stacks of engines in passing would be about fifteen feet, perhaps twenty, from the edge of the roof, and nearly level with it, perhaps not quite so high.

As to the condition of the roof, distances, etc., Jones was corroborated by several witnesses, and none swore to the contrary. Some stated that it was a dangerous roof, and liable to ignite from sparks. Several testified that the wind was blowing from the southeast, which caused the sparks from the engines to fly towards the depot. Two witnesses swore that on the night of the fire, about nine o'clock, they saw two engines passing the depot emitting large quantities of sparks, some of which fell on the roof.

J. M. McKinney, the cousin and brother-in-law of the plaintiff, testified that he came to Ringgold on Saturday, the 8th of February, and asked for the plaintiff's goods, and was told by the defendant's agent that they were in the depot; that he inquired what freight was due on them, and the agent replied by handing him a piece of paper with \$33 17 written thereon; that witness asked if he must take the goods out on that evening, or whether they could stay until Monday; that the agent asked him how he came to town, and on being informed that he came on horseback, told him the goods could stay until the day suggested; that witness then asked him if there would be any additional expense, to which the agent replied there would not be; that on the following Monday he came from where plaintiff lived, twenty miles in the country,

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with a three-horse team and wagon, and when two miles from town noticed that the sun was about two hours high; that he came directly to town and found the depot closed; that he went to a neighboring store and inquired where the agent was, and was informed that he had probably gone to supper; that the sun was then an hour or an hour and a half high.

McKinney was corroborated by several other witnesses.

J. M. Henery, the agent of the defendant, testified that on the Monday evening alluded to he was engaged in the depot until very late receiving freights for shipment, etc.; that he thinks he remained until after sun-down; that he then closed the depot and went to supper just in time to get back to meet the down train; that he had to meet this train and usually got his supper before it came; that he was absent not exceeding one hour, and when he returned he remained until nine o'clock; that the evening was dark and cloudy.

Other witnesses testified as to the character of the evening, and that the agent left the depot about sun-down.

The jury found for the plaintiff. The defendant moved for a new trial upon the following, among other, grounds:

1st. Because the court erred in charging the jury "that the defendant was bound to exercise ordinary diligence in taking care of the plaintiff's goods, and is liable for failing to take such care of the goods as every prudent man takes of his own goods; and that this applies to all of the surroundings; that they might consider the house in which the goods were stored, the roof, the liability to take fire from passing engines, and in fact all the surroundings, and say from the facts proved whether the defendant exercised ordinary diligence in keeping the plaintiff's goods, and if it did not it would be liable."

2d. Because the court erred in charging the jury that the defendant was bound to ordinary diligence in keeping all goods, and in refusing to charge that the neglect must be gross if there was a contract for the gratuitous keeping of the goods, in order to make the defendant liable for the loss.

3d. Because the verdict was contrary to the law and the evidence.

The motion was overruled and the defendant excepted.

D. A. WALKER, by J. A. W. JOHNSON, for plaintiff in error.

W. H. PAYNE, for defendant.

TRIPPE, Judge.

1. The charge of the court relieved the railroad company from the extraordinary liability that had been upon it as a common carrier, and gave the jury the rule approved in *46th Georgia*, 433, to-wit: that when goods shipped by a railroad have arrived at their destination and are deposited in a place for safe keeping, the liability of the railroad company as a common carrier ceases, and that of warehouseman commences. This was the proper rule in this case. But the company claims that what passed on the Saturday evening, after the arrival of the goods at Ringgold, between its agent and the agent of defendant in error, changed its character to that of a gratuitous bailee, and from that time it was only liable for gross negligence, and that the court erred in not so charging. The goods had been in the depot four or five days. It was Saturday afternoon when the consignee's agent inquired of the company's agent if he should take them out then, or could they remain until the ensuing Monday. Upon learning that the agent of the owner came to town on horseback, he was notified by the railroad agent that the goods could remain until the next Monday and there would be no further charge on that account. It would be a very strict rule upon the owner of goods to hold that this lost him any right he then held. It was only for such a length of time as was almost a necessity, under the circumstances.

2. The whole charge of the court is not given by the reporter, nor are all the requests made by plaintiff in error to the court, to give in charge to the jury, set forth. One or two of those requests could properly have been given; but we

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think substantial justice was done by the verdict, and the general charge of the court being correct, and as the requests which might have been properly submitted to the jury would not probably have affected the result, a new trial will not be granted on that account: 20 *Georgia*, 50; 37 *Ibid.*, 94, 195.

3. There is a still more serious difficulty in the way of plaintiff in error. The record shows that the interrogatories of four witnesses were read to the jury, and were considered on the hearing of the motion for a new trial. In the brief of the testimony these depositions are referred to as having been introduced on the trial, and by agreement of counsel they were to be used when the motion for a new trial was heard. From what appears in the testimony in the record, these witnesses whose interrogatories were used were cognizant of the leading and material facts of the case, and doubtless their testimony was of importance to the parties. These interrogatories are not included in the record or in the bill of exceptions, nor does it appear that they were omitted by consent of the parties. Though there was no suggestion of diminution of the record, this court would require a very clear and undoubted case before it would reverse a judgment refusing a new trial under such circumstances. All the testimony should be here unless its immateriality appears. Especially was this necessary in this case.

Judgment affirmed.



JAMES ALLEN, plaintiff in error, vs. THOMAS N. GIBSON,
defendant in error.

That a defendant paid too much for land is no defense to notes given for the purchase money, where he had opportunity of examination, even though he acted upon the representations of the plaintiff and another.

Vendor and purchaser. Sales. Before Judge JAMES JOHNSON. Talbot Superior Court. September Term, 1874.

For the facts, see the decision.

MARION BETHUNE, by E. H. WORRILL, for plaintiff in error.

No appearance for defendant.

WARNER, Chief Justice.

The plaintiff brought his action against the defendant on two promissory notes for \$712 95. To this action the defendant pleaded that the notes were given for eighty-two acres of land adjoining defendant; that plaintiff and one Castleberry fraudulently combined to cheat defendant, by representing to him that the land was worth \$15 00 per acre, when it was worth only \$4 00 per acre, and thus induced him to purchase the land at the former price, and divided the two notes between themselves. The plaintiff demurred to the defendant's plea, the court sustained the demurrer, and the defendant excepted. It appears from the record that the land purchased was *adjoining* the land of defendant, and there is no pretence that he was prevented, or did not have ample opportunity to examine the land and see for himself what it was worth before he purchased it. If he thought proper to rely upon the representations of the plaintiff and Castleberry as to the value of the land to him, instead of examining and looking at the land with his own eyes before he purchased it, he has no one to blame for his credulity and folly but himself; the courts will not relieve him: *Tindall vs. Harkinson*, 19 *Georgia Reports*, 448. There was no error in sustaining the demurrer to the defendant's pleas.

Let the judgment of the court below be affirmed.

Bird *vs.* The State of Georgia.

TOM. BIRD, plaintiff in error, *vs.* THE STATE OF GEORGIA,
defendant in error.

1. There was no error in the refusal of the continuance.
2. Where there was a special plea that the grand jury, who, at a previous term of the court found the indictment, were not sworn, and it appeared from the minutes "that the grand jury retired to their room, selected William H. Hughes as their foreman, returned into court and were duly impaneled, to-wit : " giving the names of the jurors :
Held, that it was competent for the court to determine such an issue from an inspection of the minutes, and it was not error to hold that from the record it appeared the jury were duly sworn.
3. Where a special plea was filed to an indictment, that one of the grand jurors was an incompetent juror, and an issue was made thereon and tried before a jury, and verdict rendered against the plea, and the defendant, without moving to set aside the verdict, entered the plea of not guilty :
Held, that after a conviction it was too late to attack the verdict of the jury rendered on the special plea, on the ground that it was contrary to the evidence.
4. If incompetent evidence was admitted on the trial of such special plea without objection, and the court charged the jury thereon, the admission of such testimony cannot be made a ground of error.
5. Where a defendant in an indictment pleaded in bar, that a previous indictment had been pending against him for the same offense of which he was then charged, which had no fatal defects, and that it had been *not. proessed* by order of the court, against his consent :
Held, that there was no error in overruling the plea.

Criminal law. Continuance. Jury. Practice in the Superior Court. Evidence. Before Judge JAMES JOHNSON.
Muscogee Superior Court. November Term, 1874.

Tom. Bird was placed on trial for the offense of burglary. The defendant moved for a continuance on the ground that he had been confined in jail since October, 1873 ; that he had subpoenaed a witness by the name of Driver Reid, who had theretofore resided in Tuskegee, Alabama, but had recently moved to Wacoochee Valley in the same state ; that the witness could not attend court on account of sickness in his family ; that he expected to have him present at the next term :

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that he expected to establish by him an *alibi*, stating the facts.

This motion was supported by the affidavit of Hamp Bird, the brother of the defendant. Upon cross-examination, he stated that a continuance had been allowed the defendant at the last term, in part, on account of the absence of the same witness; also, that the same facts could be shown by him, (Hamp Bird,) and his wife.

As an additional reason for the continuance, counsel for the defendant stated in his place, that he had just been informed that one Mike Anderson, one of the grand jurors who found the bill under which the defendant was to be tried, was not a citizen of the United States, but was a subject of Great Britain; that he desired to put in a special plea in bar, and to that end, wished time to examine the records and to prepare testimony.

The court overruled the motion because it believed it to have been made for delay, and defendant excepted.

The defendant then pleaded specially in bar, that the grand jurors impaneled at the last term of the court, who preferred the indictment, were not sworn.

Issue being formed upon this plea the court directed the solicitor general and the clerk to be sworn. They testified that the grand jurors were qualified in the usual manner. The minutes of that term also showed that "the grand jury retired to their room and selected William H. Hughes as their foreman, returned into court and were duly impaneled, to-wit: John H. Meyer," etc.

The court, without the intervention of a jury, ordered the plea to be stricken, and the defendant excepted.

The defendant then pleaded that Mike Anderson, one of the grand jurors who preferred the indictment, was not a citizen of the United States, but was a subject of Great Britain.

Upon issue being formed on this plea, the court ordered it to be submitted to a jury. Evidence was introduced, the jury charged, and a verdict returned against the plea. Various exceptions were taken to the rulings made on this collateral

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trial, but they are immaterial here as this court, in view of the further history of the case, refused to pass on them.

The defendant pleaded further that at the November term, 1873, a true bill was found against him for the same offense as that with which he is now charged; that he was convicted thereon, but upon writ of error to the supreme court, (see 50 *Georgia Reports*, 585,) the judgment was reversed. That at the May term, 1874, when the judgment of the supreme court was made the judgment of the superior court, the said bill of indictment, upon motion of the solicitor general, was *not proessed*, the defendant objecting thereto, there being no fatal defect therein. That the defendant thereupon demanded his release, which was refused by the court. That at the same term, the grand jury found the true bill now being prosecuted, charging him with the same offense as that for which he was tried at the November term, 1873; wherefore he prays that he may be discharged and go hence without a day.

Upon demurrer this plea was stricken, and the defendant excepted.

The plea of not guilty was then filed. The jury found to the contrary.

Error is assigned upon each of the above grounds of exception.

G. E. THOMAS; REESE CRAWFORD, for plaintiff in error.

W. A. LITTLE, solicitor general, for the state.

TRIPPE, Judge.

1. It is sufficient to say upon the first point that the court did not abuse its discretion in refusing the continuance.

2. The minutes of the court showed that the grand jury who found the bill at a previous term "retired to their room, selected William H. Hughes as their foreman, returned into court and were *duly impanneled, to-wit:*" and then the names of the jurors were set forth in full on the minutes. The issue made by the plea on this point could be determined by the minutes, and there was no error in the judgment that it ap-

peared from the record the jury were duly sworn. The entry on the minutes could mean nothing else.

3. There was an issue upon the special plea setting up the incompetency of one of the grand jurors. That issue was tried before a jury selected for that purpose. No motion was made to set aside that verdict. A plea of not guilty was filed, and after a verdict of guilty was rendered against the defendant, a motion was made to set the latter verdict aside and grant a new trial, on the ground that the one rendered on the special plea was contrary to the evidence. There should have been a motion to set aside the first verdict. If the defendant submitted to it without excepting, he could not take the chances of acquittal and failing in that, claim that the conviction was bad, because another jury had found wrong on another issue. If he had a good ground to set the first verdict aside, the court would have sustained it and the trouble and delay of the traverse trial would have been avoided. Suppose the defendant, after the return of the first verdict, had ascertained that one of the jury trying that issue was an incompetent juror, or discovered any other fact that would have vitiated the verdict. Could he, without moving for such cause, have gone into the trial last had, and then set up that it should go for naught, for reasons which he knew at the time would enable him to avoid a verdict of guilty? If the facts were discovered too late for him to have availed himself of them in time, the question would be different. But here, the reasons given in the final motion, if good, existed, and were as well known before the trial of the final issue as afterwards.

4. It is always too late after verdict on the trial of any issue to raise, as a ground to set it aside, that incompetent testimony was admitted, unless objection was made to it at the proper time, either when it was offered, or at least before a verdict was rendered. This rule might also be modified if the party was not aware of the facts on which the objection to the evidence rests, and was not guilty of *laches* in the matter. This is not pretended in this case.

5. At the same term of the court at which this bill was

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found, the solicitor general, by authority of the court, entered a *nolle prosequi* upon another indictment against the defendant for the same offense. This was done at the May term, 1874—six months before the trial. The defendant objected to the *nolle prosequi*, and at the time it was entered demanded his release. He pleaded at the trial those facts, and that the bill which was *nolle prosequied* had no fatal defects, and prayed that he might be discharged and go without a day. The court, on motion, struck the plea. Section 4649 of the Code is: "No *nolle prosequi* shall be allowed, except it be in open court, for some fatal defect in the bill of indictment, to be judged of by the court, in which case the presiding judge shall order another bill of indictment to be forthwith submitted to the grand jury," etc., etc. This *nolle prosequi* was ordered at May term, 1874. The defendant objected because there were no fatal defects. The judgment of the court was rendered at that term on all the questions. No exceptions were filed, and the presumption of law is, that the judgment of the court was right. If the defendant desired to avail himself of his rights under this statement of facts, he should have put himself in a position to do so. He could not wait until the next term when put upon his trial, and then ask for a review of the former judgment of the court upon the same point he raised by his plea, to-wit: whether there were any fatal defects in the former indictment which would have authorized the *nolle prosequi*. We do not mean to concede by this that an erroneous judgment of the court in allowing a *nolle prosequi*, as this was done, would entitle a defendant to a discharge, as he might be if it was allowed after the case was submitted to a jury. Was not the intent and meaning of the enactments on these two matters different? We do not think the rule would be as strict in such a case as this as under the other provision of the law which forbids any entry of a *nolle prosequi* on a bill of indictment after the case has been submitted to the jury, except by the consent of the defendant. There was no error in the judgment overruling the plea.

Judgment affirmed.

The Mayor and Council of the City of Atlanta vs. Perdue.

THE MAYOR AND COUNCIL OF THE CITY OF ATLANTA,
plaintiff in error, vs. JAMES P. PERDUE, defenant in error.

If a defect in the sidewalk of a municipal corporation, caused by an excavation made by a party in the erection of a building, has existed for such a length of time as by reasonable diligence in the performance of their duty, the defect ought to have been known by the corporate authorities, then notice will be presumed, and proof of actual knowledge will not be necessary to render such corporation liable for injuries thereby occasioned.

Municipal corporations. Streets. Notice. Before Judge
HOPKINS. Fulton Superior Court. March Term, 1874.

For the facts, see the decision.

W. T. NEWMAN, for plaintiff in error.

B. F. ABBOTT, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant to recover damages for injuries sustained in falling into an excavation made in the defendant's sidewalk on Mitchell street, in the city of Atlanta, the same being one of the public streets in said city. On the trial of the case, the jury, under the charge of the court, found a verdict for the plaintiff for \$725 00. A motion was made for a new trial, on the ground that the court erred in overruling the defendant's motion for a non-suit, because the plaintiff had failed to prove that the defendant had *notice* of the excavation in the sidewalk of the street at the time of the injury complained of, and because the court failed to charge the jury, that to entitle the plaintiff to recover he must prove that the defendant had *notice* of the excavation in the sidewalk of the street at the time of the injury. The motion for a new trial was overruled, and the defendant excepted. It appears from the evidence in the record, that the excavation in the sidewalk was made by a party who was erecting a building adjacent thereto, and the

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excavation was made to allow grates to cover the area wall of the building. The excavation into which the defendant fell, in the night time, was eight or ten feet deep, no railing around it, nor lights there; the excavation had been there two or three weeks. The general rule of law is, that a municipal corporation is bound to keep its streets and sidewalks in a safe condition for travel in the ordinary modes, by night, as well as by day, and if it fail to do so, it is liable for damages for injuries sustained in consequence of such failure. A municipal corporation is liable for injuries caused by its *neglect* or *omission* to keep its streets and sidewalks in repair, as well as for those caused by defects occasioned by the *wrongful acts of others*. In the latter class of cases the foundation of the action is *negligence*, and if the defect in the sidewalk or street had only existed for a short time, as for a night or a day, so that the defendant could not *reasonably* be presumed to have had any knowledge of it, then *notice* of the defect in the sidewalk or street, to the defendant, should be shown in order to make it liable. But if the defect in the sidewalk or street of the city, existed for such a length of time as by reasonable diligence in the performance of its duty, the defect *ought* to have been known by it, then notice will be presumed, and proof of *actual* notice is not necessary. The principle is this, that if the defendant, by the exercise of *reasonable* diligence in the performance of its duties, has the means of knowledge of defects in the streets and sidewalks, though caused by others, and negligently remains ignorant thereof, it is equivalent to actual knowledge. In the case before us, the excavation in the defendant's sidewalk had been there two or three weeks, and if it did not know that the excavation was there on one of its public sidewalks, it was because of its own *negligence*, and the law will charge it with a knowledge of that which it *ought* to have known in the performance of its duty to the public. There was no error in refusing the non-suit for want of proof of notice to the defendant of the excavation in its sidewalk, or in failing to charge the jury that to entitle the plaintiff to recover he must prove that the defendant had notice of the ex-

cavation in the sidewalk at the time of the injury complained of, on the statement of facts disclosed in the record.

Let the judgment of the court below be affirmed.

THE MAYOR AND CITY COUNCIL OF MADISON, plaintiff in error, vs. ROBERT N. BOOTH, defendant in error.

1. The owner of a lot in an incorporated town leaves the outer strip of his lot fronting on the public highway or street, open and unfenced. Over this uninclosed part the public were accustomed to pass, as a sidewalk, for upwards of twenty years; but no assertion of municipal authority over it was shown by any ordinance for widening the street, or by any act, such as working it, etc., showing any control over it by the public, except the use of it, as stated. The owner, during this time, used this open front as a necessary way of access, both on foot and by wagon, to his residence and to his workshop situated thereon; had filled up an old ditch that run the length of the front, and had, by opening a way for the water that flowed from a higher point, protected this portion of the lot from being washed. He also used a portion of the open front to keep wagons and other vehicles which were carried to his shop for repairs:

Held, that this constituted no such dedication of this front to the exclusive use of the public as to vest in the authorities of the town the right, by way of improving the street, to open or ditch upon and through the whole length of the uninclosed front, so as to seriously obstruct the ingress and egress of the owner to and from the balance of his property.

2. As the evidence shows that the jury assumed as the measure of damages, the injury done to plaintiff's land by permanently keeping the ditch open, the judgment is affirmed on the condition that the plaintiff will enter on the minutes of the court a renunciation of any claim to further damages, with permission to the city to keep said ditch open, and to make future necessary repairs thereon.

Municipal corporations. Streets. Dedication. Before Judge BARTLETT. Morgan Superior Court. September Term, 1874.

This case is sufficiently reported in the above head-notes.

BILLUPS & BROBSTON, for plaintiff in error.

A. G. & F. C. FOSTER, for defendant.

TRIPPE, Judge.

1. As stated by the reporter, the facts are pretty fully given in the head-notes. The title of Booth to the strip of land was fully proved and was not contested. By not extending his inclosure to the limit of his lot, an outside narrow front was left adjoining the highway, and the public were accustomed to pass over this as a sidewalk. He had also used it for his own purposes, protected it from being washed by the rains, made it the way for access both to his dwelling and his workshop, and kept wagons and other vehicles on it which were brought to his shop for repairs. Even if this use by the public would bar the owner from denying it to them hereafter, it did not authorize the authorities of the town to dig a ditch through its length so as to cut off the owner from the approaches to his own premises, where his family lived, and likewise to obstruct the ingress and egress of his customers to his shops where he earned his living. It is, to say the least, doubtful whether the owner had lost the right, if he chose to do so, to inclose this strip and assert his exclusive use of it. The case of *Irwin vs. Dixon et al.*, 9 Howard, 10, presented but few additional facts beyond what this case shows in behalf of the owner's right to fence in a portion of a lot belonging to him, which had been used for a long time as a highway in the city of Alexandria. His right so to do was sustained by the supreme court of the United States: See, also, 3 Bingham, 447; 11 East, 370; 30 Georgia, 896; 44 *Ibid.*, 529; 22 Pick., 75. Without determining that question, as it is unnecessary to the judgment we render, it is sufficient to say we are satisfied he was entitled to damages for the injury he has sustained.

2. From the evidence, it appears that the jury assumed, as the measure of damages, the injury which the plaintiff would suffer by permanently keeping the ditch open. As the city of Madison has asserted its dominion over this strip of land, and plaintiff's counsel states that he is ready to remit all claim for any future damages, the judgment is affirmed on condition that he makes such an entry on the minutes of the court,

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with such further permission to the city as will authorize them to make future necessary repairs on the ditch, etc., all of which will be specified in the judgment.

Judgment affirmed.

FORTUNE N. CHISHOLM *et al.*, plaintiffs in error, vs. AUGUSTUS H. LEE, executor, defendant in error.

Where money is bequeathed to the widow for life, and at her death to the heirs of the testator, it is the duty of the executor to invest the principal, and to pay over the interest to the widow, so as to preserve the former for the benefit of those ultimately entitled.

Administrators and executors. Legacies. Life estates. Wills. Before Judge HALL. Newton Superior Court. March Term, 1874.

For the facts of this case, see the decision.

CLARK & PACE, for plaintiffs in error.

J. J. FLOYD, for defendant.

WARNER, Chief Justice.

This case comes before this court on a bill of exceptions as to the proper construction to be given to the fourth and sixth items of the will of I. P. Henderson, deceased. The bill of exceptions recites that the parties were at issue as to the duty of the defendant, as executor, under the fourth and sixth items of the will of Isaac P. Henderson, which said items are in the following language, to-wit: "Item 4th. I loan to my wife during her natural life, \$5,000 00. Also, that my executors purchase for my wife a negro woman or girl, such as she may select, the same to be loaned to her her lifetime, the same to be purchased out of the proceeds of my property." "Item 6th. It is my will and desire, that at the death of my wife the money loaned her, and the negro to be purchased by my exe-

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cutors, be sold and equally divided amongst all my children, and my grand-daughter, Elderrinda Brown, and the share going to my grand-daughter is to be placed in the hands of the trustee named in the fifth item of this will, and under the same restrictions and limitations." The court held that it was the duty of the executor, under the will of the testator, to pay over to Ruth Henderson, his widow, the \$5,000 00 loaned her in the fourth item of the will. To which ruling of the court the complainants excepted.

The court also ruled that it was the duty of the executor, after the death of Ruth Henderson, the widow, to take steps to recover the possession of the \$5,000 loaned her under the will of testator, for the purpose of distributing the same amongst the legatees of Henderson, the testator. To which last ruling of the court the defendant excepted. This last ground of error was abandoned by the defendant on the argument here, and the only question to be considered is the first ground of error alleged by the complainants in the bill of exceptions.

By the 2253d section of the Code, an estate for life cannot be created in such property as is destroyed in the use. When money is loaned or given to one for life, and it is manifestly the intention of the testator that the money so loaned or given, shall be divided after the death of the person who has only a life interest in it, amongst his children and his grand-daughter named in his will, and that his grand-daughter's share thereof is to be placed in the hands of a trustee named in his will, under certain restrictions and limitations therein specified, as in the will of the testator now before us, it was the duty of the testator's executor, appointed by him to execute his will, to hold the principal sum of money so bequeathed, in trust for the objects of the testator's bounty, inasmuch, as the money bequeathed to the testator's widow for and during her life would be destroyed in its use, and thus the intention of the testator might be defeated, if the money was paid into her hands. The rule applicable to this class of cases was correctly stated in *Thornton vs. Burch*, 20 *Georgia Reports*, 793. It was the

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duty of the executor to have invested the money, and paid the interest thereon to the widow during her life, so as to have preserved the principal for those whom the testator clearly intended should have it after the death of his widow. The testator did not intend that the principal of the money bequeathed to his widow during her life should be destroyed in the use of it by her, but on the contrary, he intended that his children and grand-daughter should have it after her death, and to carry out that intention his executors were appointed to execute his will, and it was their duty so to execute it so as to effect that intention, by investing the money, paying the widow the interest thereof during her life, and at her death to divide it equally amongst his children and grand-daughter as directed by the testator's will; that was what the executors were required to do; that was what the testator entrusted his executors to do, in order to carry out his expressed intention in regard to the \$5,000 00 bequest, specified in the fourth item of his will. In our judgment, the court erred, in view of the provisions of the fourth and sixth items of the testator's will, in holding that it was the duty of the executor to pay over to the widow, Ruth Henderson, the \$5,000 00 loaned her in the fourth item of the will.

Let the judgment of the court below be reversed.

ROBERT BADKINS, plaintiff in error, vs. WILLIAM L. ROBINSON, marshal, defendant in error.

1. The mayor and council of the city of Columbus were authorized by the act of November 17, 1864, to prohibit the sale by retail, of fresh meats and vegetables during market hours at any other place than the market house. By a subsequent section of said act, it was provided that no person should be punished under any ordinance passed by virtue of said act, except such persons as shall usually bring marketable articles for sale by retail at the market house :

Held, that said act is not unconstitutional.

2. Whether any person prosecuted for the violation of such ordinance comes within the exception, is matter of proof on the trial, and can-

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not be inquired into on the hearing of a *habeas corpus* sued out by one who is in custody, under a judgment of conviction for violating the ordinance.

Habeas corpus. Constitutional law. Market. Municipal corporations. Before Judge JAMES JOHNSON. Muscogee County. At Chambers, July 26th, 1874.

M. W. Murphy, as marshal of the city of Columbus, presented to the judge of the superior court of Muscogee county his petition for the writ of *certiorari*, making this case:

On July 18th, 1874, Robert Badkins was charged before the mayor's court of said city with a violation of section four of the market ordinance, in that he sold certain fresh meats at his store-house, a place in the city other than the market-house, during market hours. Said ordinance had been passed by the mayor and council of said city under an act of the legislature, entitled "an act to authorize the mayor and council of the city of Columbus to erect a market-house in one of the streets of said city, and to pass ordinances to establish and regulate a public market in said city." Assented to November 17th, 1865. To this charge Badkins pleaded the unconstitutionality of the aforesaid ordinance, and not guilty. He was found guilty and sentenced to pay a fine of \$50 00, and in default thereof, to be confined in the guard-house for thirty days. He failed to pay said fine, and was imprisoned by petitioner in accordance with the terms of said judgment. Badkins presented his petition for the writ of *habeas corpus* to the Honorable Joseph F. Pou, the county judge, in which he alleged that he was illegally imprisoned, because the 4th section of said ordinance was unconstitutional, and because he was held without due process of law. The 4th section, above referred to, was as follows: "And no fresh meat (all meat considered fresh unless salted one week,) shall be sold at any other place in the city than the market-house during market hours." The county judge ordered Badkins to be discharged. This judgment petitioner excepted to, and asks the writ of *certiorari* that the same may be corrected.

The petition was sanctioned and the writ issued. It was admitted by the county judge and the respective parties that the petition fairly presented the facts. Upon the hearing before the judge of the superior court, the decision of the county judge was reversed and the case remanded for a rehearing. To this ruling Badkins excepted.

After the case reached this court Murphy died, and his successor in office, Robinson, was made a party.

BENNING & BENNING; RUSSELL & RUSSELL, for plaintiff in error.

C. H. WILLIAMS; PEABODY & BRANNON, for defendant.

TRIPPE, Judge.

1. The ordinance of the City Council of Columbus was authorized by the act of November 17th, 1864, and it was therefore not obnoxious to the decision in the case of *Bethune vs. Hughes*, 28th Georgia, 560. The right of the legislature to regulate trade, and to authorize municipal corporations so to do within their respective limits, has been recognized by this court from the time of its organization. It is only necessary to refer to some of the decisions on that point without further citing them: 5th Georgia, 546; 6 Ibid., 13; 18 Ibid., 586; 43 Ibid., 421. As was said in the case in 5th Georgia, *supra*, in reference to ordinances that are legal and constitutional and those which are not, "the true distinction is between an ordinance which operates as a total exclusion or deprivation of the right of the citizens, and one which *merely regulates* the exercise and enjoyment of it for the benefit and security of the inhabitants of the city." We do not think that any of the provisions of the constitution of 1868 operate to deny this power in the legislature. The case in 43d Georgia, 421, was decided since 1868, and the same questions were then raised on the argument which are presented here.

2. Whether one who is prosecuted for a violation of such ordinance comes within the exception of a subsequent section

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of the act, was a question to be inquired into, and was a matter of proof on the trial of the prosecution.

Judgment affirmed.

THE MAYOR AND ALDERMEN OF SAVANNAH, plaintiff in error, *vs.* JAMES K. HINES *et al.*, defendants in error.

1. By the 2d section of the general tax act of 1874, a specific tax of \$10 00 was imposed upon every practitioner of law, medicine and dentistry. By the 11th section it was provided that no assessment should be made for corporation or county purposes on such specific taxes. The mayor and aldermen of Savannah imposed a tax of \$25 00 on every person or firm transacting the business of the law: *Held*, that such tax was legal. It was not an assessment upon the specific tax imposed by the state, but it was a tax imposed upon the business of the law, as authorized by the charter of the corporation.
2. That section of the ordinance which requires that a firm shall pay but one tax is right in principle, and would be unjust and unequal if each partner was to be taxed separately.

Tax. Partnership. Before Judge TOMPKINS. Chatham County. At Chambers. March 9th, 1875.

For the facts of this case, see the decision.

JACKSON, LAWTON & BASINGER, for plaintiff in error.

A. B. SMITH, for defendants.

WARNER, Chief Justice.

This was a bill filed by the complainants against the defendant, praying for an injunction to restrain it from the collection of a tax of \$25 00 which the defendant, by an ordinance, had imposed on every lawyer in the city of Savannah, for municipal purposes. The presiding judge granted the injunction prayed for, and the defendant excepted.

1. By the 4847th section of the Code, the Mayor and Alderman of the city of Savannah, have full power and author-

ty, to make such assessments and lay such taxes on the inhabitants of said city, who transact or offer to transact business therein, as said corporate authorities may deem expedient for the safety, benefit, convenience, and advantage of said city. On the 30th day of December, 1874, the mayor and aldermen of said city passed a general ordinance to assess and levy taxes for the year 1875, to raise revenue for the city, on the inhabitants thereof, including those who held taxable property therein, and those who transact or offer to transact *business* therein, by the 6th section of which ordinance it is declared that every person and corporation transacting, or offering to transact, either of the kinds of *business* hereinafter mentioned shall pay the tax hereinafter prescribed, to-wit: "Every lawyer, physician and dentist, \$25 00." The 15th section of the ordinance declares that a "a firm or copartnership of persons carrying on business jointly in the same establishment, and *bona fide* as partners, shall not be compelled to pay more than one tax for the business of one establishment." By the 2d section of the act of the general assembly of 1874, a *specific* tax of \$10 00, was levied upon every practitioner of law, medicine and dentistry. By the 11th section of that act it is declared "that no assessment shall be made for corporation or county purposes, on the *specific* taxes herein imposed on practitioners of law, medicine, dentistry, and photography: *Provided*, this section shall apply to all who practice and charge for the same." The tax complained of is not a tax assessed by the defendant as a corporation on the *specific* tax of \$10 00 imposed by the state, on lawyers, and does not purport to be such a tax, but it is a tax imposed by the defendant as a corporation on the *business* of the complainants transacted within the corporate limits of the city, as authorized by the 4847th section of the Code before cited. The specified authority granted to the defendant as a corporation to levy a tax on *business* transacted in the city, was not repealed, nor intended to be repealed, by the general law of 1874, which only prohibited corporations and counties from assessing a tax on the *specific* tax of \$10 00 imposed by the

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state, for corporation or county purposes; that is to say, the intention of the act of 1874 was to declare that no corporation, or county, should assess a tax of twenty-five per cent, or other rate, on the *specific* tax of \$10 00, for corporation or county purposes, leaving the defendant, as a corporation, to tax *business* transacted within its limits under its special grant for the purpose as it theretofore had done; that was all the act of 1874 intended to do, and that was all that it did do. If *the business* of the complainants is not sufficient to authorize them to pay the tax of \$25 00 imposed thereon by the ordinance of the city, they are not compelled to transact or offer to transact *that business* within the limits of the corporation, but if they do, then they are bound as law-abiding citizens to pay it.

2. That section of the ordinance which requires that a firm or copartnership carrying on business jointly in the same establishment as partners shall pay but one tax on that business, is right in principle, but would be wrong, unjust, and unequal, if each partner was to be taxed separately on the business of the copartnership. The injunction in this case, to restrain the collection of the tax, was granted without authority of law, and in violation of the law.

Let the judgment of the court below be reversed.

G. P. GUILFORD & COMPANY, plaintiffs in error, vs. F. A. STACER, defendant in error.

1. The inference that an agent is authorized to collect a written security for a debt because it is in his custody, ceases when the security is withdrawn by the creditor; and this, even though the debt may have been contracted through the agent.
2. If the debtor pay such a claim to one who is not in possession of the security, it is incumbent on him to show that the person receiving payment had authority to collect the debt.

Principal and agent. Debtor and creditor. Promissory notes. Payment. Before Judge POTTLE. Hancock Superior Court. October Adjourned Term, 1873.

Guilford & Company, through their agent, William Stanford, sold to Stacer a piano, stool and cover, taking his note therefor. This instrument was sent to plaintiffs. After its maturity they instituted suit thereon. The defendant pleaded payment in full to Stanford, the agent. The jury found for the defendant. The plaintiffs moved for a new trial, upon the ground that the court refused to charge the jury "that if they believed that after the piano had been sold and the note given by Stacer to plaintiffs and turned over to them, that Stanford's agency had ceased as to that transaction, and that defendant had such evidence before him as to induce him to believe it, you should find for the plaintiffs."

And also because the court charged the jury, in substance, that the defendant was not liable if Stanford was a general agent, with power to sell and to take money in payment for sales, which fact they must determine from the testimony. That if Stanford sold any other pianos and took pay in part, and afterwards, the principals in Macon, through their book-keeper, received the balance of the debt without objection, they might consider that as a ratification of that act of Stanford, and they might look to that circumstance in determining whether he was such general agent.

The motion was overruled, and plaintiffs excepted.

E. F. BEST, for plaintiffs in error.

C. W. DuBOSE; GEORGE F. PIERCE, Jr., for defendant.

TRIPPE, Judge.

1. This case comes fully within the decision rendered this term in *Howard & Soule vs. G. L. Rice*. The authorities therein cited establish the following positions: The inference that an agent is authorized to collect a written security for a debt because it is in his possession, ceases when the security is withdrawn by the creditor; and this even though the debt has been contracted through the agent.

2. If the debtor pay such a claim to one who has not the

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custody of the security, it is incumbent on him to show that the person receiving payment had authority to collect the debt. Under these principles, which largely control the case, the court should have granted the new trial.

Judgment reversed.

JAMES P. SIMMONS, plaintiff in error, *vs.* GEORGIA V. MARTIN, administratrix, defendant in error.

Where it is sought to enjoin the enforcement of a common law judgment on the ground that the complainant was prevented from making his defense to the suit in which the same was rendered, by mistake, oversight, etc., due diligence must be shown, and the facts set forth demonstrating how such omission occurred.

Equity. Injunction. Judgments. Before Judge RICE. Gwinnett County. At Chambers. April 20, 1875.

The principle of law enunciated is sufficiently clear without the report of any facts additional to those stated in the decision.

JAMES P. SIMMONS, for plaintiff in error.

N. L. HUTCHIN; F. F. JUHAN, for defendant.

WARNER, Chief Justice.

This was a bill filed by the complainant against the defendant praying for an injunction to restrain the collection of a common law *fi. fa.* issued on a judgment obtained against the complainant. The presiding judge refused the injunction prayed for, and the complainant excepted. This is the third time this case has been before this court. The complainant insists that he has been prevented from making his defense to the suit at law against him, by mistake, oversight, unintentional, undiscovered and accidental omission and surprise, as he has alleged and set forth in his bill. The general rule is that

a court of equity will interfere with the judgment of a court of law only, when the party complaining had a good defense of which he was entirely ignorant, or where he was prevented from making it, by fraud, or accident or the act of the adverse party, unmixed with negligence on his part: Code, sections 3129, 3218, 3220. On looking through the allegations contained in the complainant's bill, the same are not sufficient, in our judgment, to entitle him to have the common law judgment against him enjoined under the rule before stated. Parties, when sued at law, are bound to full diligence in making their defense. It is not sufficient for a party to allege that he has been prevented from making his defense, by mistake, oversight, unintentional, undiscovered and accidental omission, but he must further allege *how* the mistake, oversight, unintentional, undiscovered and accidental omission, occurred, so that the court may see that there was no fault, or want of diligence on his part, which the allegations in complainant's bill fail to show. It is for the interest of parties that there should be an end of litigation.

Let the judgment of the court below be affirmed.

WILLIAM UPCHURCH, plaintiff in error, vs. HENRY LEWIS
et al., defendants in error.

1. To make a sale of land legal and valid, which is sold under a judgment for the purchase money against the vendee, who holds a bond for titles, the vendor must make, file, and have recorded in the office of the clerk of the superior court, a deed of conveyance to the vendee.
2. Though the vendee may bar himself of his right to demand that the sale be set aside, by acts of ratification on his part, to repudiate which would be a fraud on third parties, yet his mere presence at the sale, without protest against it, when it does not appear that he was aware of the fact that the deed had not been filed and recorded, would not estop him.
3. It being impossible to ascertain from the evidence in the record what amount was due on the executions at the time of trial, and the judge who tried the case being dissatisfied with the verdict, and having grant-

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ed a new trial generally, one of the grounds being that the verdict was contrary to the evidence, we cannot say that there was an abuse of his discretion.

Judicial sale. Vendor and purchaser. Bond for titles. Executions. Estoppel. New trial. Before Judge HALL. Henry Superior Court. October Term, 1874.

William Upchurch filed his bill against Henry Lewis, Hal. Dorsey, John Stillwell and Willis Goodwyn, sheriff, making, in brief, this case: In the year 1856 complainant bought of Lewis one hundred and one and one-quarter acres of land in the county of Henry, at the price of \$600 00, to be paid in four annual installments of \$150 00 each, the first to become due on December 25th of that year. Notes were accordingly delivered and bond for titles given. The first and second notes were paid in full, and a payment made on the third. In the latter part of 1859 or first of 1860, complainants acknowledged service on suits brought on the third and fourth notes, upon which judgments were subsequently rendered. During the winter of 1862-3 the complainant paid off said judgments in full, but no final settlement was had. Lewis admitted such payment, but deferred making a deed, first for one cause and then another. In 1868 Lewis claimed that there was a small balance due him, and complainant paid him \$45 00. After all this, Lewis, with a view of defrauding complainant, transferred said judgments and conveyed said land to John Stillwell, who took with full notice of all of the aforesaid facts. Stillwell had a levy made in 1869, and complainant paid to him \$45 00, and sale was deferred. In December, 1872, the land was sold under the aforesaid levy, and bid off by Hal. Dorsey, for \$390 00. No deed was filed prior to said levy or prior to said sale, as required by law. The executions were fully paid off and discharged prior to said sale. Waives discovery. Prays that said sale may be vacated, and the deed made in accordance therewith canceled; that an accounting may be had, and said executions decreed to be satisfied; that the deed from Lewis to Stillwell may be canceled and the

former decreed to execute a title in conformity with his bond; that the defendants may be restrained from disturbing complainant's possession until these matters are inquired into.

The defendants all answered, denying that the executions had been paid off, and alleging that the purchase by Stillwell was made at the request of the complainant, and for the purpose of giving him longer time to complete his payment for the land; that at the time Stillwell bought, upon a settlement had between complainant and Lewis it was distinctly agreed that \$236 00 was then due by the former; that complainant was present at the sale, and made no objection thereto; that subsequently he sent a message to Dorsey proposing to take the land at his bid, and to pay one-half cash, and good interest on the balance; that Stillwell did file a deed in the clerk's office before the day of sale, but after the levy.

The evidence for the respective parties made the case presented by their pleadings. It appeared that Stillwell executed a deed to complainant on October 22d, 1872, and had the same filed in the clerk's office, but that it was never recorded; also, that the complainant was present at the sale and made no objection thereto. It is impossible to ascertain from the evidence what is the balance due on the executions.

The jury found the sale illegal, and that the property belonged to complainant upon the payment of \$230 00 to Stillwell. The defendants moved for a new trial upon the following grounds, to-wit:

1st. Because said verdict was contrary to the law and the evidence.

2d. Because the verdict was contrary to the charge, that if complainant consented to the sale of the land and the transfer of the executions to Stillwell for a valuable consideration, and without notice of any defense to said *fi. fas.*, then the jury should find for the defendants.

3d. Because the verdict was contrary to the charge, that if the deed from Stillwell was filed in the clerk's office after the levy, but before the sale, and Dorsey purchased without no-

Upchurch vs. Lewis et al.

tice of the failure to file the deed before the levy, he would be protected.

The motion was sustained, and a new trial ordered. To this ruling complainant excepted.

SPEER & STEWART, for plaintiff in error.

S. C. McDANIEL; J. Q. A. ALFORD, for defendants.

TRIPPE, Judge.

1. It was decided in *Parks vs. Bailey*, 22 Georgia, 116, which was reaffirmed in *Harvill vs. Lowe et al.*, 47 Georgia, 214, and in *Brunson vs. Grant*, 48 Georgia, 394, that a sale of land by a sheriff under an execution for the purchase money against the vendee who only holds a bond for titles, is illegal unless the vendor has filed and had recorded in the clerk's office a deed to his vendee for the land before the levy. This principle applies to this case.

2. It is true the vendee may bar himself of the right to demand that the sale be set aside, if he so act as to induce others to purchase, and where it would be a fraud on such purchaser to permit him to repudiate those acts or the sale which he may have aided in effecting. But he is not estopped, from the fact that he was present at the sale and did not protest against it, when it does not appear that he knew or had notice that the deed had not been filed and recorded. Those were acts which he could not control, and with which he had nothing to do.

3. We cannot ascertain satisfactorily from the evidence in the record what amount was due on the execution at the time of the trial. The verdict fixed that amount. It set aside the sale as illegal, and found the land to be the property of complainant, upon his paying Stillwell, who was the transferee of the execution, and who became the purchaser by assu nung the bid of Lewis, the sum of \$230 00. It is very probable there was a larger amount due on the execution. It is impossible to tell from what is before us. The judge before

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whom the case was tried granted a new trial, and under all that appears we cannot say he abused his discretion.

Judgment affirmed.

THE SCREVEN HOSE COMPANY OF SAVANNAH, plaintiff in error, *vs.* THOMAS N. PHILPOT *et al.*, defendants in error.

A company incorporated for the purpose of keeping a hose carriage and hose, with which to extinguish fires, cannot recover damages for the breach of a contract on the part of the owners of a steamboat, in failing to furnish said boat to convey said company and its friends on an excursion of pleasure and profit. The contract was beyond the objects contemplated in its charter.

Corporations. *Ultra vires.* Contracts. Before Judge CHISHOLM. City Court of Savannah. July Term, 1874.

For the facts of this case, see the decision.

R. R. RICHARDS; J. V. RYALS, by A. B. SMITH, for plaintiff in error.

RUFUS E. LESTER, by J. R. SAUSSY, for defendants.

WARNER, Chief Justice.

The plaintiff sued the defendants for a breach of contract, alleging that the defendants, in consideration of the sum of \$125 00, to be paid by plaintiff on demand, contracted and agreed with plaintiff to furnish for the use and convenience of plaintiff a certain steamboat, *Rosa*, the property of defendants, for one day, to-wit: the 29th July, 1873, for the purpose of an excursion to Bluffton, South Carolina, by the officers and members of plaintiff's corporation, and friends; that defendants wilfully and maliciously refused to perform said contract, to the great damage of the plaintiff. The defendants pleaded that the plaintiff had no legal power or authority, under its charter, to make such a contract as that set forth in its declaration, and the court so charged the jury, whereupon the plain-

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tiff excepted. The only question in the case is whether the plaintiff had the power and authority under its act of incorporation to make the contract alleged in its declaration. The petition for, and the act of incorporation, is as follows:

"STATE OF GEORGIA—CHATHAM COUNTY.

"To the Honorable the Judge of the Superior Court of Chatham County:

"The petition of Isaac Russell and others, respectfully sheweth that your petitioners, in connection with other parties, have entered into an association under the name of 'The Screven Hose Company of Savannah, Georgia,' and that the object of their association is to keep on hand a suitable hose carriage and hose in the city of Savannah, county of Chatham, and state of Georgia, and with said hose carriage and hose, and their personal exertions, to assist in the extinguishment of fires in said city of Savannah, and in the protection of the property of their fellow-citizens; and that under the provisions of the charter applied for in this petition, no capital stock is required to be paid in, the incorporation proposing not to act upon capital stock, but only for the purposes first aforesaid. And your petitioners pray that they, with the other members of their association, may, for the purpose aforesaid, be incorporated by the name and style of 'The Screven Hose Company of Savannah, Georgia,' for the space of twenty years, with the privileges incident to corporations created by courts, as provided by the statutes of the state, and your petitioners will ever pray, etc.

"Filed May 5th, 1870."

"SUPERIOR COURT OF CHATHAM COUNTY,

"May Term, 1874.

"STATE OF GEORGIA—CHATHAM COUNTY:

"On reading the foregoing petition, the court being satisfied that the application is legitimately within the purview and intention of the statutes of the state of Georgia in that behalf made and provided, and that the terms of the law have been complied with: It is ordered that the said application be granted, and that the petitioners, with the other members of

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the association and their successors, be, and they are hereby incorporated and made a body corporate and politic, by the name and style of 'The Screven Hose Company of Savannah, Georgia,' for and during the term of twenty years, with the privilege of renewal at the expiration of that time, according to the provisions of the laws of Georgia. And it is further ordered that the said corporation shall have power to make and pass such constitution, by laws, rules and regulations for the management of the affairs and business of the company, which may be deemed needful, as may be framed and adopted by the officers and members of the same, not inconsistent with law. And further, to exercise all corporate powers and privileges incident to corporations created by courts, as provided by law. And it is further ordered that a certified copy of this petition and order, under the seal of the court, be furnished by the clerk of the court to the petitioners.

(Signed)

"WILLIAM SCHLEY,

"Judge Superior Court Eastern Circuit.

"Savannah, June 6th, 1874."

The contract set forth in the record was not necessary or legitimate for the purpose of carrying into effect any of the objects contemplated in the charter of the company. The object and purpose of the grant in the act of incorporation was to enable the company to keep on hand a suitable hose carriage and hose in the city of Savannah, to assist in the extinguishment of fires therein for the protection of property. The contract with the defendants for a steamboat to make an excursion to Bluffton, South Carolina, by the officers and members of the corporation, and their friends, had nothing to do with the management of the affairs and business of the company as contemplated by its charter, that we can discover. If the individual members of the company with whom the contract was made by the defendants, had sued them for a breach thereof in their individual capacity, we will not say they could not have recovered damages.

Let the judgment of the court below be affirmed.

 Young vs. Moses.

WILLIAM H. YOUNG, plaintiff in error; vs. RAPHAEL J. MOSES, defendant in error.

1. Where the stockholders in a corporation, by resolution, ceased to do business, and directed that all its assets be placed in the hands of one of its officers, for the purpose of being converted into money for distribution amongst the stockholders after payment of its debts:
Held, that the corporation is a necessary party to a bill filed by one of the stockholders against the officer thus constituted an agent, for an account and settlement of such stockholder's interest.
2. Though the corporation may have no public place for doing business, and no one in office upon whom process may be served, a remedy for such a case is provided in section 3370 of the Code.

Corporations. Stockholders. Parties. Service. Before Judge JAMES JOHNSON. Muscogee Superior Court. November Term, 1874.

Moses filed his bill against Young, in which he alleged, in brief, that he was a stockholder in the Eagle Manufacturing Company; that the stockholders of said company, in the year 1865, by resolution, ceased to do business, and directed all of the assets to be converted into money for payment of debts and distribution; that the defendant was then the secretary of the company, and all of its assets, to the value of \$400,000 00, were placed in his hands for the purposes aforesaid; that the Eagle Manufacturing Company has ceased to have any organization as a corporation, or any legal representative, or to do business of any kind whatever, its last corporate act being the transfer of its assets to the defendant; that he has ever since controlled said assets, individually, as trustee for the shareholders, disposing thereof without consultation with those interested, and distributing the same at such times and in such manner as he saw fit; that complainant has no other means of calling the defendant to account except as a *cestui que trust* entitled to share in the assets.

The bill then proceeded to enumerate the assets of the Eagle Manufacturing Company which went into the hands of the defendant, to charge various acts of maladministration of

the trust, and ends with a prayer for discovery as to the actions of the defendants, for a full accounting, for the appointment of a receiver, and for the writ of subpoena.

The defendant demurred to the bill for want of equity, and because the Eagle Manufacturing Company was not made a party defendant. The demurrer was overruled, and the defendant excepted.

PEABODY & BRANNON; INGRAM & CRAWFORD, for plaintiff in error.

R. J. MOSES, for defendant.

TRIPPE, Judge.

1. There are several facts appearing in the bill not given in the reporter's statement, showing that although the Eagle Manufacturing Company had ceased to do the business for which it was organized—in fact, by resolution had declared that all business was to cease except the collection and distribution of its assets among the corporators, still, for several corporate purposes it yet existed, and its authorities acted several years after the resolution of 1865 to go into liquidation was adopted. One was a meeting, and action taken by the stockholders not long prior to the filing of this bill. Another is, that in 1871, a certificate, whereby complainant became a stockholder, was issued to him, signed by the president and secretary. But besides this, a corporation does not cease to exist by the adoption of resolutions by the stockholders that it will do no more business. A dissolution requires more than a mere declaration: Abbott's Law of Corp., 289; Code secs. 1684, 1685; 39 *Georgia*, 574; 37 *Ibid.*, 410; 6 *Ibid.*, 130. There could not be a case in which there was a greater necessity that the corporation should be a party than this. The object of the bill is to ascertain and settle what is due complainant as a stockholder, after all its indebtedness was discharged or provided for. Each stockholder has an interest in this; and the whole body of them, as a corporation, is interested. That body is represented

Sears vs. The Central Railroad and Banking Company.

by the officers, whose duty it is to protect the rights of each, by protecting the aggregate right of all. The assets are in the hands of an agent chosen by the corporation. He is responsible to it. What is in his hands cannot be reached by proceedings instituted and carried on against him individually or exclusively. Where the corporation is in existence it must be made a party: 8 Wallace, 64; 10 Pick., 125; 3 Paige, Ch., 222, 440; 12 Metcalf, 371.

2. Even though the corporation may have no public place for doing business, and no one in office upon whom service of process may be made, the complainant is not without a remedy. Section 3370 of the Code, recognizing the rule that the corporation must be a party, provides for service, which is as full and complete as if had upon the regular officers. We can see no reason why any departure from fixed rules is necessary in this case, and our opinion is that there was error in the holding of the chancellor on this question.

Judgment reversed.

MARY JANE SEARS, plaintiff in error, *vs.* THE CENTRAL RAILROAD AND BANKING COMPANY, defendant in error.

1. It is not the duty of the conductor of a freight train to couple and uncouple cars except in the case of a pressing emergency, of which the jury must judge. If he is killed in performing such service, in the absence of such emergency, he is not without fault, and his widow cannot recover damages from the railroad company.
2. The verdict being excessive and unsupported by the evidence, a new trial was properly ordered.

Railroads. Conductor. Damages. New trial. Before Judge HALL. Spalding Superior Court. August Term, 1874.

For the facts, see the decision.

B. H. HILL & SON, for plaintiff in error.

SPEER & STEWART; JACKSON, LAWTON & BASINGER, for defendant.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendant to recover damages for the homicide of her husband. On the trial of the case, the jury found a verdict for the plaintiff for the sum of \$10,000 00. The defendant made a motion for a new trial on the several grounds set forth therein, which was granted by the court on the 10th, 11th, 12th and 13th grounds contained in the motion, which several grounds are as follows: Because the verdict of the jury was contrary to the charge of the court. Because there was no evidence before the jury on which to base a verdict for \$10,000 00, even though it was clear that the plaintiff was entitled to recover something. Because the verdict of the jury was against the evidence, and the weight of the evidence. Whereupon the plaintiff excepted.

1. It appears from the evidence in the record that the plaintiff's husband, at the time he was killed, was in the employ of the defendant as a conductor of a freight train on the defendant's road, and when engaged in that capacity, he undertook to uncouple a train of cars when in motion, and was killed, telling Ellis, one of the train hands whose duty it was to uncouple the cars "to draw in the bell line, that he would uncouple for him, that he was in a hurry and wanted to get out of the way of the passenger train." To have entitled the plaintiff to recover in this case for the homicide of her husband, he being an employee of the defendant, it was necessary to prove that his death was caused by the negligent and improper conduct of the defendant, *without fault or negligence on his part*. It was not the duty of the plaintiff's husband, as the conductor of the defendant's train, to couple and uncouple cars, unless in case of a pressing emergency, and if he undertook to do so when there was no pressing emergency and was killed, he was not *without fault*, in contemplation of the law.

Brown vs. Hanson.

Whether a pressing emergency existed in this case, which would have authorized the conductor to have taken the risk of uncoupling the cars at the time and manner he did, would be a question of fact for the jury under the evidence, which was very slight upon that point, if indeed any *pressing emergency* was shown at all.

2. In view of the evidence in relation to this point in the case, as well as the evidence contained in the entire record, when considered in connection with the principles of law applicable thereto, the court below did not err in setting the verdict aside. The judgment of the court setting aside the verdict might well be sustained on the ground that the verdict under the evidence contained in the record was *excessive*. In this class of cases, when the attempt is made to plunder a railroad corporation under the forms of law, by the obtaining of verdicts which parties are not legally and justly entitled to retain, it is the duty of the courts to set them aside. When the evidence shows that a railroad company has been *willfully* and *grossly* negligent in the performance of its duties, and injury has resulted therefrom, the courts, in such cases, will be more reluctant to interfere with the verdict, but the evidence in the record discloses nothing of that sort, in this case.

Let the judgment of the court below be affirmed.

AMOS BROWN, plaintiff in error, vs. JAMES F. HANSON, defendant in error.

1. There was no abuse of discretion in granting a new trial.
2. The words "he had perjured himself—he swore lies before the court at Madison, according to the church book," are actionable *per se*.
3. Where the words charged in the declaration to have been spoken were the above, without setting out the latter words, "according to the church book," and it appeared in proof that such additional words were also used by the defendant, it is not such a variance as to be fatal to the plaintiff's case.

Slander. New trial. Before Judge BARTLETT. Morgan Superior Court. March Term, 1874.

Hanson brought complaint against Brown for \$10,000 00 damages, alleging that the defendant had falsely and maliciously said of and concerning him, on September 21st, 1872, the following false and malicious words, to-wit: "That he, (meaning your petitioner,) had perjured himself. That he swore a lie before the court at Madison." The defendant pleaded not guilty, and that if he ever used such words he did not do so through malice, or with the intent to impute to the plaintiff a crime punishable by law, or for the purpose of injuring and damaging him in any manner; but solely and entirely for his own vindication, and he so understood by the person to whom they were addressed.

The evidence for the plaintiff showed the use of the language charged by the defendant, on several occasions, but sometimes qualified by the additional words, "according to the church book." Taking all the testimony together, it is clear that the defendant, in the use of such language, relied upon the church book to sustain his assertion.

It is impossible to gather precisely from the record what the church book would show, but it appears that the defendant had been sued for slander by a Mrs. Sarah E. Adams, upon the trial of which case the plaintiff in this suit testified against the defendant, and swore to facts which the defendant claimed were contrary to evidence which he had given in upon a trial had before the church, of which they were both members.

The jury found for the defendant. The plaintiff moved for a new trial, because the verdict was contrary to the law and the evidence. The motion was sustained, and the defendant excepted.

BILLUPS & BROBSTON; A. G. & F. C. FOSTER, for plaintiff in error.

REESE & REESE, for defendant.

TRIPPE, Judge.

1. As this case is to undergo another trial we will not discuss the testimony. The speaking of the words was proved, and without any evidence introduced by the defendant, or upon cross examination, showing their truth, and indeed without setting up justification at all, the verdict was for the defendant. We cannot say there was an abuse of discretion by the court in granting a new trial.

2. It was argued that the addition made to the charge uttered against the plaintiff of the words "according to the church book," relieved them from the character of words which are actionable *per se*. It was also said that as the declaration did not set forth those words, a variance was proved, which was fatal. We do not agree to either proposition; not to the first, because if it were so, then any charge could be made against any person, and if he who makes it will add the like or similar words, such as "according to the record," "according to proof in my possession," or "if I am not misinformed," or many other such qualification, etc., he could slander and destroy character in the most odious way with impunity, so far as legal redress is concerned.

3. Nor do we think that proof of such additional words is such a variance as would defeat a plaintiff's right of recovery. When the defendant added the words "according to the church book," they neither took away from the force of the charge he had made, or relieved him from the necessity of sustaining the truth of what he had said. At least, there is nothing in the record showing what the meaning of those additional words was, or why they were used. It is left to conjecture—a conjecture that did not so authorize the verdict as to make the setting it aside error. Only one case need be referred to as illustrating the holding we make, and it does illustrate both points. In *Treat vs. Browning*, 4 Conn., 408, the words set out in the declaration were, "she has had a bastard child;" those proved were, "if I have not been misin-

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formed, she had a bastard child." It was held not to be an immaterial variance.

Let the judgment be affirmed.

WILCOX, GIBBS & COMPANY, plaintiffs in error, vs. ISAAC R. HALL, defendant in error.

1. A seller of fertilizers warrants that the article is merchantable and reasonably suited to the use intended. He warrants that it is a manure, that it is reasonably suited for giving additional capacity to land to produce a crop. The planter must determine if the fertilizer is suited to his land. The seller does not warrant against the seasons, so that, if his fertilizer fails on account thereof, the purchaser is liable.
2. The warranty that it is reasonably suited to the use intended, that it will increase the productiveness of the land, is not broken if bad cultivation or the seasons cause the loss of the crop. The purchaser is bound to use reasonable care and caution in putting out his fertilizer. To entitle the defendant to a verdict he must show clearly that his bad crops resulted from the worthlessness of the guano.
3. The opinion of a chemist, made after an analysis of the guano, is evidence to be considered, but is not conclusive of the suitability of the guano for the purpose intended.
4. The admissions of an agent only bind the principal when made in the scope of his business as agent, and if either party relies on such admissions he must show they were made in the scope of his business.

Warranty. Sales. Evidence. Principal and agent. Admissions. Before Judge POTTLE. Oglethorpe Superior Court. October Term, 1874.

For the facts of this case, see the decision.

LUMPKIN & OLIVE, by JOHN. C. REED, for plaintiffs in error.

W. G. JOHNSON, for defendant.

WARNER, Chief Justice.

This was a proceeding instituted by the plaintiffs against the defendant to foreclose a merchant's lien for guano sold to

him. The defendant filed his counter-affidavit, alleging that the guano purchased of the plaintiffs was worthless as a fertilizer, and not reasonably suited to the use intended. On the trial of the issue between the parties, the jury, under the charge of the court, found a verdict in favor of the defendant. The plaintiffs made a motion for a new trial on the grounds contained therein, which was overruled by the court, and the plaintiffs excepted.

The main grounds of error insisted on here was the refusal of the court to charge the jury as requested, and to the charge as given. The court was requested to charge the jury: "If you believe from the evidence before you that the fertilizer bought by defendant contained the chemical ingredients which ought, with proper use under ordinary circumstances, to promote vegetation, and is such a fertilizer, then the plaintiff is entitled to recover in this case." "The law of implied warranty which requires all dealers in fertilizers to warrant them reasonably suited to the use intended, does not require the seller to guarantee results or an actual increase of production. If the evidence shows that the fertilizer sold was of such a nature and contained such elements as will reasonably produce increased production, and is such a fertilizer, the plaintiff has complied with the requirements of the law, whether in point of fact the crop of the defendant was increased by the use of the fertilizer or not." There is a great deal of evidence in the record in relation to the practical effect of the use of the guano on the defendant's crop, and although the evidence is conflicting, still, we think there is a preponderance of evidence in favor of the defendant as to the worthlessness of the particular lot of guano as a fertilizer sold by the plaintiffs to the defendant, whatever may have been the chemical ingredients of the plaintiffs' fertilizer as generally prepared by them. Practical demonstration of the value of a fertilizer, when properly used, is a much safer and better test than mere theories. The court charged the jury as follows:

"If there is no express *covenant* of warranty the purchaser must exercise caution in detecting defects; the seller, however,

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in all cases, unless expressly or from the nature of the transaction excepted, warrants: 1st. That he has a valid title and right to sell. 2d. That the article sold is merchantable and reasonably suited to the use intended. 3d, That he knows of no latent defects undisclosed.

"A seller of fertilizers warrants that the article is merchantable and reasonably suited to the use intended. He warrants that it is a manure, that it is reasonably suited for giving additional capacity to land to produce a crop. The planter must determine if the fertilizer is suited to his land. The seller does not warrant against the seasons, so that, if his fertilizer fails on account of the seasons, the purchaser is liable.

"The warranty that it is reasonably suited to the use intended, that it will increase the productiveness of the land, is not broken if bad cultivation or the seasons cause the loss of the crop. The purchaser is bound to use reasonable care and caution in putting out his fertilizer. To entitle the defendant to a verdict he must show clearly that his bad crops resulted from the worthlessness of the guano.

"The opinion of a chemist made after an analysis of the guano, is evidence for you to consider, but is not conclusive evidence of the suitability of the guano for the purpose intended. You may look to the constituents of this guano as shown by Dr. Means and others, to determine the value of this manure. You may look also to the testimony of witnesses before you going to show experiments with the same kind of guano, and practical results. Theories may not accord with experience. If the testimony of witnesses, founded on experiment and trial, preponderates in favor of the defendant, and satisfies you that the article sold was not reasonably suited for the uses intended, you ought to find for the defendant; but if the testimony, mixed with theory and experiments with this guano, preponderates in favor of the plaintiffs, you ought to find for them."

The court also charged the jury, at the request of the plaintiffs' counsel, as follows:

"If you believe from the testimony that the fertilizer

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bought by the defendant from the plaintiffs, was reasonably suited to the use intended, plaintiffs are entitled to a verdict at your hands, although it may be true that the crop of defendant was not benefited by the use of said fertilizer. In determining whether said fertilizer was really suited to the use intended you may look to all the testimony.

"The law, where there is no express contract, does not require the plaintiff to guaranty that his fertilizer is of the highest grade. It must be reasonably suited to the use intended, that is reasonable increase in the production of crops, and if you believe, under instructions already given you, that this fertilizer was such a fertilizer as would produce such increased production, then the court charges you that you may consider it reasonably suited to the use intended.

"The admissions of an agent only bind the principal when made in the scope of his business, as agent, and if either party relies on such admissions, he must show they were made in the scope of his business."

In view of the evidence contained in the record, and the previous rulings of this court in similar cases, we find no error in the charge of the court to the jury, or in refusing to charge as requested. There was no error in overruling the motion for a new trial.

Let the judgment of the court below be affirmed.

JOHN T. COOPER, plaintiff in error, *vs.* THE MAYOR AND COUNCIL OF THE CITY OF ATHENS, defendant in error.

1. The municipal authorities of the city of Athens have no power, under its charter, to establish and carry on a ferry across the Oconee river, though it be within the city limits.
2. Nor are the mayor and council in their corporate capacity, liable to a passenger who claims that his property was injured by the negligence of the ferryman in transporting it over a ferry thus established without authority of law.

Municipal corporations. Roads and bridges. Ferry. County matters. Before Judge RICE. Clarke Superior Court. February Term, 1874.

This case is clearly stated in the above head-notes.

COBB, ERWIN & COBB, for plaintiff in error.

T. W. RUCKER, for defendant.

TRIPPE, Judge.

1. The authority given by charter to the mayor and council of Athens to keep the streets and public roads in good order and repair, did not confer upon them the power to establish and carry on a ferry across the Oconee river which runs through the town. A ferry does not come within the terms, streets and public roads. The grant of a right to build a bridge conveys no ferry franchise, nor does the right to a ferry carry with it the power to erect a bridge: 9 *Georgia*, 517; 14 *Georgia*, 1; Code, sec. 703. Much less would the grant to a municipal corporation, of power to keep in order and to repair streets and roads, confer on it the power to establish and work a ferry.

2. This being so, the corporation is not liable to an action by one who claims damages for an injury to his property caused by the negligence of the ferryman in transporting it across such a ferry. In *The Mayor, etc., of Albany vs. Cunniff*, 2 Coms. 165, it was held that in order to charge a corporation in an action on the case for negligence in the performance of a public work, the law must have imposed a duty or conferred the power to do such work. A clear distinction is drawn in the authorities between cases where the act done is within the scope of the corporate powers as given by the charter or by special statute, and those cases where it is clearly *ultra vires*, and not within the power of the corporation to act in reference to the matter at all. If the act complained of be not in this sense *ultra vires*, that is, if it be

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within the scope of such duties and powers as are prescribed by law, the corporation is liable for the negligence of its servants in their performance of such duties and powers. But if such wrongful act is outside of its special or general powers, it is not liable, whether it was done by command directly of the corporate authorities, or resulted from the negligence of its officers in the performance of such unauthorized work: See 2 Dillon on Mun. Corp., sec, 766, *et seq.*, and authorities cited. This principle distinguishes this case from that of *The Mayor and Aldermen of Savannah vs. Wilson & Gibson*, 49 *Georgia*, 476. The municipal authorities of Savannah had the power by law to establish and erect a market house, but not in the street where it had temporarily erected one. In exercising the authority granted them, they abused it to the injury of some of the citizens, and were held liable. So an action will lie against a city corporation by the owner of land through which its agents have unlawfully made a sewer: 11 *Gray*, 345. Also for trees destroyed and injuries done by them: 5 *La. An.*, 660. These and the like, are cases arising out of illegal acts, but which spring from matters or transactions within the general or special powers of the corporation: See 19, *Pick.*, 576; 46 *Mo.* 546; 40 *N. Y.* 442. Neither the case in 49 *Georgia*, or those last cited are like the one under consideration. It comes within the principle that where the act is clearly *ultra vires*, outside of and beyond any power or duty conferred on the corporation, and was not done in the performance of such duty or power as is directly granted, or which was within the scope of those which are conferred, there is no corporate liability.

Judgment affirmed.

GREEN HARRIS *et al.*, plaintiffs in error, vs. THE STATE OF GEORGIA, defendant in error.

Where several persons were indicted for the offense of an assault with intent to commit murder, and it appeared that there was a consider-

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able crowd present besides the defendants at the time the crime was alleged to have been committed, evidence from a witness to the effect that he heard some one cry "kill him, kill him" was inadmissible.

Criminal law. Evidence. Before Judge HILL. Macon Superior Court. December Term, 1874.

For the facts, see the decision.

ROBINSON & SON; W. S. WALLACE, for plaintiffs in error.

C. F. CRISP, solicitor general, by brief, for the state.

WARNER, Chief Justice.

The defendants were indicted for the offense of an "assault with intent to murder," and on the trial thereof were *all* found guilty by the jury. A motion was made by the defendants for a new trial on the several grounds specified therein, which was overruled by the court, and the defendants excepted. One of the grounds of error alleged in the motion for a new trial is, "that the court allowed Summerlin, a witness for the state, to testify, over the objection of defendants, that he heard some one in the crowd cry 'Kill him! kill him!' when the evidence did not show that such cry came from any one of the defendants, or any one engaged with them as conspirators or joint offenders."

It appears from the evidence in the record that a great number of persons were present at the time the difficulty occurred between the defendants and the party assaulted, which was in a public street of the town where there had been a political meeting. The evidence is that there was a good crowd following Rhodes at the time he was assaulted by the defendants, twenty-five or thirty, who acted like they were pretty tight. The evidence in the record does not disclose the fact that a conspiracy was proved between the defendants prior to the difficulty, to do any bodily harm to Rhodes, the party assaulted. The only evidence of their intention to do him any bodily harm was from their acts and conduct at the

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time of the difficulty, and therefore, it was incumbent on the state to prove that the cry "kill him, kill him," came from the defendants, or some one of them. If there had not been any other persons present but those engaged in the difficulty, it would have been a fair legal presumption, that the words "kill him," were uttered by the defendants, or some one of them, but the evidence shows that there was a large crowd of persons present besides the defendants, at the time of the difficulty between the parties.

The defendants were indicted for an assault upon Rhodes, with the intent to murder him. The evidence of the words heard by the witness, was offered to prove *that intention* on the part of the defendants, and if it had been shown that the defendants, or any one of them engaged in the unlawful act of assaulting Rhodes, had uttered the words testified to by the witness, it would have been strong evidence as to what was their intention in making the assault upon him, and it is quite probable that the jury found the defendants guilty upon that evidence, when it was not proved that any one of the defendants uttered the words which the witness heard. The material point in the case was, with what *intention* was the assault made on Rhodes by the defendants? To prove that it was their intention to murder him, the state was allowed to prove by the witness, that he heard some one in the crowd of persons who were present at the time of the difficulty, cry out "kill him, kill him," when the evidence did not show that such cry came from any one of the defendants or from any one engaged with them as conspirators, or joint offenders. The admission of this evidence over the defendants' objection, to prove their *intention* in making the assault, under the statement of facts disclosed by the record, was error. Whether the defendants were guilty of an assault with intent to murder under the evidence, or only guilty of an aggravated riot, or an aggravated assault and battery, we express no opinion. Whilst it is the policy of the state to indict and punish those who violate the law for the grade of offense of which they are guilty, it is not the policy of the state to indict and

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punish offenders for a *higher grade* of offense, as defined by the penal Code, than that for which they are actually guilty.

Let the judgment of the court below be reversed.

MARCUS A. BELL, plaintiff in error, *vs.* BOYD & BRUMBY,
defendants in error.

1. Parol evidence was admissible to show whether the parties intended the receipt given to the defendants by the assignees of the lease contract, to be a settlement of all future liability of the defendants for rent, or was only meant as a discharge of whatever the assignees could claim by the transfer to them, and was not to affect the rights of the lessor, under a reassignment of the lease to him.
2. The evidence fully sustained the judgment of the justice, and it should not have been set aside.

Evidence. New trial. Before Judge HOPKINS. Fulton Superior Court. October Term, 1874.

On June 10th, 1873, Bell leased to Boyd & Brumby a storehouse for the period of two years from August 15th succeeding, at \$25 00 per month. On the same day Bell transferred said instrument to Longley & Robinson, with right to collect rents, but to be re-transferred on his paying them "as per contract." Boyd & Brumby held a duplicate of this lease, except as to the indorsement of transfer. On March 21st, 1874, Boyd & Brumby paid to Longley & Robinson \$175 00, taking the following receipt on their duplicate lease.

"Received, Atlanta, Georgia, March 21st, 1874, of C. R. Brumby, \$175 00, on account of rents of the property described in the within contract of lease, the said lease having been assigned and transferred to us by Marcus A. Bell, and in consideration of said sum we hereby release and discharge the said C. R. Brumby and J. C. Boyd from all further liability to us for future rents upon said property.

(Signed)

"LONGLEY & ROBINSON."

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On April 1st following, the lease was re-assigned by Longley & Robinson to Bell. The latter brought suit for \$25 00 alleged to be due as rent for the month of June, 1874.

The evidence was very conflicting. Bell stated that Boyd & Brumby knew of the transfer of the lease to Longley & Robinson at the time it was made. This is emphatically denied by them. They testified that the first they knew of such transfer was in October, 1873, when Longley & Robinson demanded the rent for August and September. They then declined to pay because, in ignorance of such assignment, they had allowed Bell to become indebted to them for goods purchased at the store, which amounted to more than the rent then due.

Longley stated that at the time the receipt of March 21st, 1874, was given, it was distinctly understood between him and Boyd & Brumby, that such instrument was, in no wise, to affect the rights of Bell. That this question was discussed and it was explicitly understood that Boyd & Brumby were only released so far as the rights of Longley & Robinson were concerned. That he informed Boyd & Brumby that he intended to reassign the lease to Bell.

Brumby denied all of this and insisted that the \$175 00 was paid in full discharge of any further liability on the part of his firm on the lease, and that it was so understood between the contracting parties. The evidence was undisputed to the effect that since March 21st, 1874, Boyd & Brumby had had nothing to do with the store; that immediately after said settlement they sent the key to Longley & Robinson; that Bell had attempted to deliver to them the key since but they had declined to receive it.

The magistrate rendered a judgment for plaintiff. On a *certiorari* to this judgment it was reversed and plaintiff excepted.

M. A. BELL, for plaintiff in error.

McCONNELL & HEYWARD, for defendant.

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TRIPPE, Judge.

1. The receipt given by Longley & Robinson, which was indorsed on the duplicate contract of lease held by Boyd & Brumby, carried an ambiguity on its face, and parol evidence is admissible to explain all ambiguities, both latent and patent: Code, section 3801. The lease contract was made with Bell. He was the lessor. He transferred the contract to Longley & Robinson, reserving in the transfer that it should be reassigned to him on his paying them "as per contract." Bell testified that his lessees knew of the transfer when it was made. Longley & Robinson, in March, 1874, after more than \$225 00 rent had accrued, receipted Boyd & Brumby for \$175 00, indorsing it on their duplicate contract, and stated in the receipt that "in consideration of said sum, we hereby release and discharge the said Boyd & Brumby from all further liability to us for future rents upon said property." Longley & Robinson did not give up the contract which had been transferred to them by Bell. Longley testified that when this receipt was given he distinctly stated to Boyd & Brumby that the contract was to be reassigned to Bell; that he intended to do so; that Bell's rights were not to be affected, and Boyd & Brumby were only released so far as the rights of Longley & Robinson were concerned. Boyd & Brumby claim that by this receipt they were discharged from the lease; that they could surrender the house, and were no longer bound by the contract for any future rent. It was objected by them that Longley's testimony was not admissible, on the ground that parol evidence cannot vary a written contract. We think it was admissible. If Boyd & Brumby knew that Longley & Robinson had only a partial interest in the contract transferred to them by Bell, and that Bell had the right to have it reassigned to him, they could not, by an arrangement with Longley & Robinson, defeat that right of Bell. They could not, knowing this, vacate, by any contract with Longley & Robinson, the whole contract of lease, even if the latter parties had so stipulated expressly.

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It would have been in fraud of the rights of Bell, and if Boyd & Brumby were cognizant of it, they could not set it up against Bell. Here was a contract of lease that was not half expired. For a sum less than had accrued of the rent, the holders of the contract, to whom it had been assigned with a condition, agreed that the lessees should be discharged from further liability *to them*. The terms used indicate that the discharge granted in the receipt was a limited discharge, and implied that there was a right in somebody else. We think, under these facts, all this testimony was competent.

2. The evidence before the justice of the peace sustained the judgment which he rendered on the facts, and it ought not to have been disturbed.

Judgment reversed.

ALLEN R. DAY, plaintiff in error, vs. CHLOE OGLESBY, defendant in error.

1. Where a minor was hired by his parent to the defendant to serve him for the term of one year as a laborer, the defendant should notify such parent of any failure on the part of such minor to perform his duty before discharging him.
2. Should such minor be discharged without such notice, the parent would be entitled to have said contract apportioned and to recover for the time during which labor was performed before the discharge.

Parent and child. Master and servant. Notice. Contracts. Before Judge STROZER. Randolph Superior Court. May Term, 1874.

For the facts, see the decision.

JAMES T. FLEWELLEN, by JOHN T. CLARKE, for plaintiff in error.

H. & I. L. FIELDER, for defendant.

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WARNER, Chief Justice.

1. This case came before the court below on a *certiorari* from a justice's court. On the hearing of the *certiorari* the court overruled the same and affirmed the judgment of the justice, whereupon the plaintiff in *certiorari* excepted. It appears from the record that the plaintiff in the justice's court sued out a laborer's lien against Day, the defendant, for labor performed by her minor son, Peter, from the 1st of January, 1873, to the 1st of June of the same year, at the rate of \$8 33 per month, amounting to \$41 50. The defendant filed a counter-affidavit denying his indebtedness, and upon the trial of the issue thus formed, it appeared in evidence that both parties relied on a written contract, which was produced but not read in evidence; both parties agreed in their testimony as to its contents; the written contract was, however, transmitted by the justice in his answer to the *certiorari*, and was before the court when the judgment complained of was rendered, of which the following is a copy:

"I, Chloe Oglesby, this day certify that I hire my son, Peter McKay, to A. R. Day, to labor for him during the entire year 1873, for the sum of one hundred dollars; and I, A. R. Day, agree to pay the amount above mentioned when the year's work has been completed. This January 14th, 1873.

(Signed)

A. R. DAY,

"CHLOE OGLESBY."

There was no controversy as to the fact that Peter worked faithfully for the defendant from the 1st of January up to the 1st of June. The defendant's pretext and defense for not paying his mother for his work is, as it was shown by the evidence, that about the 1st of June, Peter's brother, who was living near the defendant, was at the point of death, and did die, and Peter went to see him in the day time, contrary to the defendant's orders, he telling him that if he went to see his brother, not to return, and that was the reason why Peter did not return. It was said on the argument here, that the

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raison why the defendant would not let Peter return was, that his brother whom he went to see, was sick with the measles, and was afraid he would catch the disease, and it would be introduced by him to his other hands and family, but that fact does not appear in the return of the justice, nor by the verdict of the jury on the traverse of the justice's return. The contract in this case was made by the defendant with the mother of Peter, for his services as her son. It was conceded on the argument that Chloe and Peter were free persons of color. The 1669th section of the Code declares that "every colored child born before the 9th day of March 1866, is hereby declared to be the legitimate child of his mother; but such child is the legitimate child of his colored father only when born within what was regarded as a state of wedlock, or when the parents were living together as husband and wife." There is no evidence in the record going to show that Peter was the legitimate child of any one except his mother, and therefore she was entitled to his services during his minority; being the only recognized parent of Peter, she had the right to exercise all the paternal power over him: Code, 4799; *Alfred vs. McKay*, 36th Georgia Reports, 440. The contract having been made with her for Peter's services, he should have notified her and obtained her consent, before he discharged Peter from his employment, or, at least, have notified her of his failure to perform his duty before discharging him from his employment under his contract with her. Inasmuch as the defendant discharged Peter from his employment without notifying his mother, with whom he made the contract, of any failure of duty on his part (admitting that going to see his sick brother under the circumstances *was* a failure of duty) she had the legal right to treat the contract as at an end by the act of the defendant, and to have the contract apportioned, as provided by the 2726 section of the Code, and to recover that portion which was due under the contract for the time he labored for the defendant. The defendant had the labor of Peter from the 1st of January up to the 1st of June, under the contract, and he *ought to pay for it*, and if he is *unwilling*

to do so, it is the duty of the courts to compel him to perform his legal and moral obligations in that respect. There was no error in overruling the *certiorari* and affirming the judgment of the justice, in view of the facts disclosed in the record.

Let the judgment of the court below be affirmed.

APPLETON P. COLLINS, plaintiff in error, vs. JOSEPH CLAYTON, trustee, defendant in error.

1. Equity will not aid a defendant in actions at law as to matters of set-off and recoupment when his legal remedies are complete and adequate.
2. Though the actions are brought in a court whose jurisdiction is limited to amounts less than the aggregate sum set up by the defenses of set-off and recoupment, that does not affect the above principle when the several pleas are only of a sum which is less than the notes embraced in each of the pending suits.
3. If all the notes sued on be for one and the same consideration, the whole defense of recoupment may be made to one of the actions, and the plea of usury filed to another.
4. In this case it was not made sufficiently to appear that the aggregate amount of these defenses exceeded the sum of the notes included in each action, so as to authorize the injunction prayed for.
5. A vendor should not be enjoined from collecting the purchase money due, because there are judgments against a chartered bank in which he is a stockholder, and to which his property by the charter may be subject—when he swears, and there is nothing shown to the contrary—that he had bills of the bank before suit was brought against it, and now holds them, which, under the charter, are more than his liability under the judgments—that he has property in his possession liable to the judgments, even if they can be enforced against him, twenty times greater than his proportion of said indebtedness, and further, offers in his answer to give bond and security sufficient to protect his vendee against all loss.

Equity. Set-off. Recoupment. Jurisdiction. Pleadings. Usury. Vendor and purchaser. Judgments. Stockholders. Banks. Before Judge HILL. Bibb county. At Chambers. March 5th, 1875.

Appleton P. Collins instituted in the county court of Bibb county, four actions at law, returnable to the October term, 1874, of said court, against Joseph Clayton, as trustee for his wife and children, upon twenty-eight notes, three of said suits being each for the sum of \$460 00, besides interest, and one being for the sum of \$52 00, besides interest, all of which were given by Clayton, trustee, to Collins, in part of the consideration for the purchase of a lot of land in the city of Macon and the erection of a house thereon.

On the 3d day of October, 1874, the defendant in said cases, filed his bill against said Collins, alleging that he had entered into the contract aforesaid, with said Collins, had paid the \$500 00 cash, as agreed upon, and also twenty-two of the fifty notes provided for in the bond for title, each for \$52 00, and had spent upon the property the sum of \$1,000 00, or other large sum, in improvements, and setting up as grounds for equitable relief:

1st. That the plastering in the house which said Collins agreed to build under the foregoing contract, had never been completed, to the damage of said Clayton, trustee, \$300 00 or other large sum.

2d. That by reason of the well and well-house having been put in a different place from that intended, said complainant had been put to an expense of \$30 00 in digging a new well and building a new well-house.

3d. That \$100 00 damage had been caused to the property of complainant by reason of leakage of the roof of the house built under the agreement.

4th. That a door on the back piazza which would have cost from \$10 00 to \$20 00, had not been put in according to contract.

5th. That he had paid the sum of \$400 00, or other large sum, as usurious interest upon said notes.

6th. That said Collins could not give a clear and unincumbered title to said property, because there were judgments in Bibb superior court for the sum of \$15,000 00, or other large

sum, in favor of W. L. Ellis & Brother, and others, which operated as a lien upon the property of said Collins.

The prayer of the bill was for an injunction against the proceeding of said common law suits, for a reduction of the debt by the amount which complainant had been injured by reason of defendant's non-compliance with his contract and by the amount of usurious interest paid, and in case of failure to remove the alleged incumbrance, an account of the sums paid to defendant by complainant, and a decree for such amounts.

Defendant demurred to all of said bill except that part as to the incumbrance on the property, upon the ground that the remedy at law was complete, and also filed an answer, the material parts of which were as follows.

1st. He admitted that the plastering had been left unfinished, but said it had been done by consent; that he had always been, and still was, ready to complete it when called upon, and that the cost of finishing it would not be more than \$100 00. Upon this point he filed the affidavit of Primus Moore, the plasterer who had done the other work in the house, averring his willingness to finish it for \$100 00.

2d. That the well and well-house had been put in the place agreed upon between him and complainant. In support of this, he filed the affidavits of Jim Stanford and Austin Brathaupt, stating that Clayton had been present when the well was dug, and consented.

3d. That the house had been fully completed, in a good and workmanlike manner, and in every respect according to contract, and had been fully accepted by said Clayton; that he had never complained in any way until he filed his bill, but, on the contrary, expressed full satisfaction at the manner in which the work was done. Upon this point he filed affidavit of C. C. Wilder, who superintended the building, stating that the contract had been fully complied with, and that Clayton had been satisfied with it. Also, affidavit of G. J. Blake, that in 1874 Clayton had tried to borrow money from

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him to pay Collins, and had not complained of any non-compliance on Collins' part.

4th. Defendant denied that complainant had ever paid him more than \$40 00 of illegal or usurious interest, and alleged that he had made advances for him in the payment of insurance and taxes, the interest of which would fully set off all extra interest ever paid.

5th. Defendant denied that there was any judgment against him which operated as a lien upon the property sold by him to defendant; he admitted that he was a stockholder of the Manufacturers' Bank of Macon, against which there were judgments, but denied that they were liens upon his property. He averred that the proportion of stock held by him bore only such proportion to the whole capital stock of the bank as would make him liable for the sum of \$700 00, if liable at all, which he denied. He alleged that he was the *bona fide* owner of \$3,000 00 of the bills of said bank, which he held and owned before any suits were commenced against it, and which amount was largely more than enough to protect him from any liability as a stockholder; that he was in possession, either by himself or his tenants, of real estate in the city of Macon of the value of at least \$15,000 00, all of which was liable to any judgment, if judgment there was, against him. He further offered to give any bond, with good and sufficient security, which the judge presiding might deem necessary for complainant's protection.

Complainant amended his bill by setting out a memorandum of seven judgments against the Manufacturers' Bank, amounting in all to about \$15,000 00, as to one of which (that of W. L. Ellis & Brother, for about \$8,000 00, principal,) it was alleged that notice had been given to the stockholders, as provided by section 3371 of the Code. This was supported by affidavit of W. B. Hill, and was not controverted. No allegation as to notice in the other cases was made. The amendment further charged that complainant had tried to borrow money of the City Building and Loan Association upon said property, and that the counsel of said

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association had declined to advise the loan on account of the judgments against the Manufacturers' Bank. Upon hearing the case, Judge Hill granted the injunction, and the defendant excepted.

WHITTLE & GUSTIN, for plaintiff in error.

LANIER & ANDERSON, HILL & HARRIS, by brief, for defendant.

TRIPPE, Judge.

1. As to the matters of recoupment to which complainant alleges he is entitled by way of deduction from defendant's claim on him, and the usury of which he complains, his legal remedies are complete and adequate. Where this is so, equity will not interfere: Code, sections 3095, 3210.

2. It is replied to this that the county court of Bibb is a court of limited jurisdiction, and complainant's remedy will not be complete and effectual in that court. We take it that this means the whole matters of defense in the aggregate exceed the jurisdiction of the county court. Let us see how this is. The jurisdiction of that court extends to suits for \$500 00. Collins sued Clayton in several actions, three being for \$468 00 each. The defense of recoupment, all included, is only for \$450 00. This is all that is claimed in his bill, and no difficulty could arise as to the jurisdiction of the court on that question, for the deduction claimed is less than the amount sued for in one action. The same may be said of the defense of usury. That is limited to \$300 00. And all this is on the basis of complainant's allegations unaffected by the denial of defendant and his supplementary affidavits. There could, then, be no difficulty in setting up the plea of recoupment to one action and usury to another, leaving two actions untouched by any defense of that sort.

3. For if all the notes sued on be for one and the same consideration, the whole defense of recoupment may be made

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to one action, and the plea of usury, or rather of set off by reason of usury paid, filed to the other.

4. It may further be said that it did not sufficiently appear that the aggregate amount of both these defenses exceeded the sum of the notes included in each of three of the actions at law to authorize the injunction. The statements in the bill do make it greater, but they were positively denied by defendant, and that denial strongly supported by the affidavits of third persons.

5. Should the injunction have been granted on the other ground? Complainant charged that Collins was a stockholder in the Manufacturers' Bank; that there were judgments against the corporation to the amount of \$15,000 00, which were a lien on his property, and that Collins could not make an unincumbered title. He does not state what amount of stock Collins owned or what his proportion of the liability on said judgments was. It is hardly possible he could be liable for the whole amount. Collins answered that the amount of stock he held could only make his liability on the judgments \$700 00; that before the actions were brought on which the judgments were obtained, he held, and now holds, bills of the bank to the amount of \$3,000 00; that he has in possession real estate in the city of Macon, by himself or tenants, of the value at least of \$15,000 00, all of which was liable to these judgments if they could be enforced against him; and he further offered to give such bond and security as the chancellor might deem necessary for complainant's protection. Under these facts, the injunction should not have been granted. Clayton was in possession of the property, and there could be nothing more than a remote possibility that his possession would ever be disturbed. How long would such an injunction continue? It could not be claimed that it should be made perpetual upon a final hearing upon this state of facts. When it could be judicially ascertained that the judgment creditors of the bank could not proceed against Collins, was a time in the indefinite future. It does not appear that they had moved or intended to move against him.

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When he offered to secure his vendee against loss, or against the judgments, it was all that under the circumstances should have been required of him.

Judgment reversed.

JOHN T. WINGFIELD, administrator, plaintiff in error, *vs.*
JOHN A. DAVIS, defendant in error.

1. Where a purchaser under bond for title, sold by absolute deed to claimant, who bought without notice that his vendor was in possession under bond, and who occupied the property continuously for a period longer than seven years, exercising acts of ownership, such claimant acquired a valid title by prescription.
2. The possession of the premises in dispute by claimant and the exercise of acts of ownership, was notice to the holder of the true title of the adverse claim.

Prescription. Bonds for title. Notice. Before Judge CLARK. Lee Superior Court. November Term, 1874.

For the facts, see the decision.

VASON & DAVIS; GEORGE W. WARWICK, for plaintiff in error.

LYON & JACKSON, for defendant.

WARNER, Chief Justice.

This was a claim case, and on the trial thereof the court charged the jury, in substance, that the claimant was protected in the possession of the land levied on under his prescriptive title thereto, and refused to charge the contrary thereof, as requested, to which charge, as given, and refusal to charge as requested, the plaintiff excepted.

1. It appears from the evidence in the record that in the year 1859, Wiley sold to Graves a settlement of land containing one thousand three hundred acres, for \$8,000 00 and

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took his notes therefor, payable as follows: \$2,000 00 due 1st January, 1860, \$2,000 00 due 1st January, 1862, \$2,000 00 due 1st January, 1864 and 2,000 00 due 1st January, 1866. Wiley gave him a bond to make him a title to the land when the notes should be paid. Wiley died and Wingfield became his administrator. In November 1867, a judgment was obtained in favor of Wingfield, administrator, against Graves, for \$1,169 15 besides interest, for the unpaid purchase money, due for the land. Wingfield, as administrator, filed a deed in the clerk's office, conveying the title to the land to Graves on the 15th of May, 1873, and on the same day had the entire tract of one thousand three hundred acres levied on, as the property of Graves, to satisfy said judgment. All of the land was sold by the sheriff, and the proceeds thereof applied to the *fi. fa.* levied thereon, except four hundred acres on the west side of Muckalee creek, which was claimed by Davis. The claimant introduced in evidence a warrantee deed from Graves to himself, for the premises in dispute, dated 23d of February, 1864, for a valuable consideration acknowledged to have been paid therefor to Graves. It also appears that Graves was in possession of the land at the time of the conveyance of the four hundred acres to Davis, and that Davis had no notice that he was in possession of it under a bond for title from Wiley. Wiley died in 1869 or 1870, and his estate was not represented until one year had elapsed after his death. It also appears from the evidence in the record that Davis, the claimant, went into possession of the land purchased from Graves, soon thereafter, and had been in the continuous possession thereof, up to the time of trial, claiming it as his own, putting improvements thereon, and had cleared up and cultivated a large portion thereof. The question made by the record in this case is, whether Davis, the claimant, had a good title to the premises in dispute by prescription? The Code declares that "actual adverse possession of lands by *itself*, for twenty years, shall give *good title* by prescription against every one, except the state or persons laboring under the disabilities

hereinafter specified. Adverse possession of lands, under *written evidence of title*, for seven years, shall give a *like title* by prescription:" Code, sections 2682, 2683. The title to the land was in Wiley, and the possession of the four hundred acres by Davis, under written evidence of title as the owner thereof, as disclosed by the evidence in the record, was *adverse* to the title and interest of Wiley in and to the land, and he in his lifetime, and his administrator after his death, could have brought an action of ejectment against Davis, and recovered possession of it.

2. The possession of the four hundred acres by Davis, exercising the acts of ownership over it as disclosed in the record, was *notice* to Wiley and his legal representative, that he was holding and claiming the land *adversely* to his title. In our judgment, the claimant had a good prescriptive title to the land in dispute under the statute, and that there was no error in refusing to charge the jury as requested, or in the charge as given, in view of the evidence contained in the record.

Let the judgment of the court below be affirmed.

GILBERT M. STOKES, plaintiff in error, vs. WILLIAM A. MAXWELL *et al.*, defendants in error.

Where a claimant held land for seven years under a title independent of that of the mortgagor, he obtained a good title by prescription, *aliter*, had he been a privy in estate with the mortgagor.

Claims. Mortgage. Prescription. Before Judge CLARK. Lee Superior Court. November Term, 1874.

This case is sufficiently reported in the decision.

HAWKINS & HAWKINS: LYON & JACKSON, for plaintiff in error.

VASON & DAVIS, for defendants.

WARNER, Chief Justice.

This case was argued with the case of Wingfield against Davis, and it appears from the record that the claimant, Stokes, did not derive his title to the land from Gilbert, the mortgagor, or from any one claiming under him subsequent to the date of the mortgage, but claimed under an independent title derived from Sutherland to Pace, and from Pace to himself, and it was admitted that the claimant, and those under whom he claimed, had been in the possession of the land for more than seven years before the levy of the mortgage *fi. fa.* If it had been shown that Sutherland and those under whom the claimant derived his title, had purchased the land from Gilbert, the mortgagor, subsequent to the date of the mortgage, then the claimant would have been a *privy* in estate with the mortgagor, and have held the land subject to the mortgage lien, and could not set up a title by prescription as against that mortgage lien, for the reason that he went into the possession of the land under a title which was incumbered with that lien. But from the evidence in the record the claimant had a good title by prescription under the statute. So far as the record shows the possession of the claimant, under his written evidence of the title, was *adverse* to that of the mortgagor and those claiming under or through him. The only evidence of title in the mortgagor was the possession of the land when the mortgage was executed, that he exercised acts of ownership over it and claimed it as his own. The court erred in charging the jury, in view of the evidence in the record, "that his prescriptive title could not avail the claimant against the mortgage lien."

Let the judgment of the court below be reversed.

THE HOME INSURANCE COMPANY OF NEW YORK, plaintiff
in error, *vs.* **BENJAMIN P. HOLLIS**, assignee, defendant in
error.

1. Hudson was insured in a fire policy, under which a right of action had accrued for a loss by fire. He engaged counsel to bring suit, agreeing with them that they should have one-third of the recovery, and as security for their interest made an absolute assignment of the policy to them. Suit was brought in the name of Hudson for \$4,000, the amount of the policy, and for twenty-five per cent. damages under the statute. Shortly thereafter Hudson was adjudicated a bankrupt. In the same month the adjudication was made, and before the appointment of an assignee, the attorneys, Hudson, and the insurance company, all knowing the above facts, settled the suit for \$2,000 00, and Hudson paid the cost and had an entry of dismissal made by the clerk. Court was in session at the time and adjourned to a subsequent month. In the meantime an assignee was appointed. The adjourned term was held but one day. At the next regular term, which was in the ensuing month, the assignee moved to have the case reinstated and to be made a party:

Held, that the right to the motion was not lost by delay.

2. Though the attorneys of the bankrupt—they being the transferees of the policy—had the right to accept or collect the \$2,000 00, as a credit on what was due, or in full satisfaction of the claim, if that amount would fairly satisfy it, yet the assignee has the right to be made a party for the purpose of contesting this latter point, if he see proper so to do, and to assert his claim to whatever may be further due and recoverable on the policy.

Bankrupt. Attorneys. Parties. Compromise and settlement. Before Judge CLARK. Sumter Superior Court. October Term, 1874.

The above head-notes report this case.

SAMUEL C. ELAM, for plaintiff in error.

FORT & McCLESKY; BENJAMIN P. HOLLIS, for defendant.

TRIPPE, Judge.

1. It would be a rigid rule as to diligence which would hold that the assignee had lost his right to make this motion. It

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is true he had been appointed assignee before the adjourned term; but that term did not continue longer than one day. The assignee had but a short time after his appointment to be informed of the condition of the bankrupt's affairs. It does not appear that he knew of the settlement which had been made before the sitting of the adjourned term, or even that the suit had ever been commenced. He made the motion at the first regular term after his appointment, and was in time.

2. When the settlement was made all the parties to it knew of the bankruptcy of Hudson, and that his attorneys held the policy by the transfer as a security for their fee. The suit was in the name of Hudson. Before his adjudication as a bankrupt the attorneys could not, without special authority, have received anything in discharge of his claim but the full amount in cash: Code, section 409. After the adjudication all his rights vested in his assignee. The assignee may not have been appointed for some time, but his title to the bankrupt's rights and property related back to the time of the adjudication. Hudson could not assign or settle them. It is true, the attorneys had the right to collect the \$2,000 00 as a payment in part, or in full of the claim on the policy, if that amount was all that was due. But neither they or the bankrupt jointly with them, could go further. If more was due and recoverable the assignee has a right to be heard as the representative of the creditors, for the purpose of collecting it. To do this it is necessary that he be made a party. He was no party to the settlement, nor to the case being entered settled on the docket. As a matter of right, he can move to vacate the entry—to reinstate the case, and to be made a party. Then all can be heard upon the merits of the settlement. That is not a question to be determined before he is a party; it is not a condition precedent on him to show that it was wrong, or not in full satisfaction of what was justly due, in order to have the case reinstated. If it were, then there would be two trials of exactly the same issue to be had. There is no necessity and no reason for this.

Judgment affirmed.

JAMES H. WOOLFOLK, plaintiff in error, *vs.* **GERTRUDE J. WOOLFOLK**, defendant in error.

1. The confession of the respondent as to acts of adultery since his marriage, uncorroborated by other circumstances, will not authorize the granting of a divorce.
2. The libellant in a divorce case is an incompetent witness to prove adultery on the part of respondent.
3. Newly discovered evidence of an independent fact, not merely cumulative, is ground of new trial.

Husband and wife. Divorce. Confessions. Evidence. Witness. New trial. Before Judge HILL. Bibb Superior Court. October Term, 1874.

For the facts of this case, see the decision.

WHITTLE & GUSTIN, for plaintiff in error.

LANIER & ANDERSON, HILL & HARRIS; B. H. HILL, for defendant.

WARNER, Chief Justice.

The plaintiff in the court below filed her libel for a divorce against the defendant, alleging as grounds therefor cruel treatment, habitual drunkenness, and adultery with a colored woman named Tabitha. On the trial there was much evidence introduced by the respective parties. The jury found a verdict for the defendant. A motion was made for a new trial on the ground that the verdict was contrary to law, contrary to the evidence, and strongly and decidedly against the weight of the evidence, and on the ground of newly discovered evidence. The court granted a new trial on the last ground specified in the motion, whereupon the defendant excepted.

1. There is evidence in the record of the defendant's unlawful intimacy with the negro woman, Tabitha, previous to his marriage with the plaintiff, but there was no other legal evidence of that fact since the marriage, except his confession, which, under the statute, was not sufficient unless corroborated.

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ted by other circumstances, to authorize the granting of a divorce.

2. The evidence of the plaintiff, so far as that evidence went to prove adultery on the part of the defendant, was incompetent and illegal: Code, sec. 3855.

3. The newly discovered evidence, therefore, of Graybill and Phillips, that they had seen the defendant visiting the house of the woman, Tabitha, *after* his marriage, was not merely cumulative evidence as to the question of adultery, but *was* an independent fact—a corroborating circumstance in support of the truth of his confession made to Mrs. Wyche. The fact that the defendant visited the woman, Tabitha, after his marriage has the more significance as to the question of adultery, because she was his kept mistress before his marriage with the plaintiff. This newly discovered evidence, when taken in connection with the other evidence in the record, probably might produce a different result on the next trial of the case. In view of the facts disclosed in the record, there was not such a manifest abuse of the discretion of the court below in granting the new trial as will authorize this court to control it.

Let the judgment be affirmed.

M. A. PAYNE, plaintiff in error, vs. EGBERT B. ROSSER, administrator, et al., defendants in error.

1. A testator in 1852 devised an estate for life to his wife, and at her death in *fee simple*, to his daughter, Mary, then living, and her issue if any. But if Mary should be deceased at her mother's death, without children, or afterwards die leaving no children, then, and in either of those events, the property was to go to and be equally divided between the children of Thomas and Jane M., deceased, the children of W. D. G., deceased, and the children of N. A. G., who is now living. W. D. G. left three children, Sarah now living, John, who died in 1858, without wife or child, Thomas, who died in 1860, childless, but leaving a widow now living. The widow of testator died in 1865; his daughter Mary died in 1872, without a child. The parents of the executory devisees were the niece and nephews of testator:

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Held, that John and Thomas took contingent interests as executory devisees, which were transmissible to their heirs.

2. That such interests did not descend to and vest in those who were their respective heirs *at the time of their decease*, but to such as answered the character of heirs to them respectively, *when the estate in Mary was determined in 1872*, and the executory devise fell into possession.
3. The children of Thomas and Jane M., of W. D. G., J. A. G. and N. A. G., took *per capita*.

Administrators and executors. Estates. Remainders. Executory devise. Wills. Distribution. Before Judge HALL. Rockdale Superior Court. October Term, 1874.

This case is sufficiently reported in the above head-notes.

L. J. WINN, for plaintiff in error.

CLARK & PACE; DOUGLAS & TURNER; L. H. FEATHERSTON, for defendants.

TRIPPE, Judge.

1. The question was not raised whether, under the terms of the will, these great nephews and nieces of testator took at all—that is, whether or not the limitation over to them was void. All parties concede that they did take, and the question made was did they take an interest that was transmissible to their heirs, where one of them, as did Thomas, died in 1860, several years before the death of Mary, when the executory devise fell into possession: See the construction given to this will in 18 *Georgia*, 545; also see 16 *Ibid.*, 545, and 30 *Ibid.*, 976. Under those decisions, John and Thomas took a contingent interest as executory devisees. They did not take a vested remainder, for Mary held a fee subject to be determined upon her dying without children then living. Was that interest transmissible to the heirs of John and Thomas? Section 2266 of the Code provides that if the remainderman dies before the time arrives for possessing his estate in remainder, his heirs are entitled to a contingent remainder interest

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when the contingency is not as to the person, but as to the event. This was but a statutory affirmance of the law as it was then recognized: 1 Fearne on Rem., 364. The same author, speaking of the transmission of such interests, pages 553, 554, says this is a property which belongs to contingent remainders in common with executory devises. See, also, 2 Fearne, 434, 435, and cases cited in both volumes; also, 7 Cranch, 456, hereinafter quoted. We have no doubt that the interest which John and Thomas took under the will descended to their heirs.

2. But such interests did not descend to and vest in those who were their respective heirs at the time of their decease. They descended to those who answered to the character of heirs, to them respectively, when the estate in Mary was determined in 1872, and the executory devise fell into possession. This is in accordance with a rule to be found as far back as 3 Reports, 42; Co. Lit. 11*b*, 14*a*, 15*a*. That rule is, that a person who claims a fee simple by descent from one who was first purchaser of the reversion or remainder expectant on a freehold estate, must make himself heir to such person *at the time when that reversion or remainder falls into possession*. This was so recognized in Goodright vs. Searle, 3 Wils., 29; and in Andrew vs. Hutton, 3 Bos. & P., 643. And it was so held by the supreme court of the United States in Barnitz vs. Carey, 7 Cranch, 456: See 15 East., 174, and the observations of Mr. Fearne upon this rule in his work on remainders, 561.

3. We affirm the judgment of the court below upon the point that these executory devisees took *per capita*. They were all equally of kin to the testator, to-wit: the children of his niece and nephews, and the gift is to them directly provided the contingency happened upon which they took at all. In 1 Roper on Legacies, 161, it is said, that the taking *per stirpes* always presupposes an irregularity of relationship: See 2 P. Wms., 383; 3 Bro. C. C., 367. The same authority, 1 Roper, 157, gives great weight to the terms "equally divided," when used in a will, for ascertaining the intent of the tes-

tator as to whether the objects of his bounty are to receive it *per capita* or *per stirpes*. It is therein said that if the testator's next of kin are a brother and the children of a deceased brother, and thus not related to him in equal degree, yet if he has shown an intention that they shall take his property in equal shares, that is *per capita*, the distribution by the statute will be superseded. This may occur when the bequest is to "relations," "next of kin," etc., to be equally divided among them, or by expressions of the like import. In the will under consideration, there was the direction for an equal division between certain devisees, who were equally related to the testator, and no indication that it was his intention for them to take as classes, which very probably would give to them individually unequal shares in the estate. The ruling of the court below is affirmed upon this point, and reversed on the first, wherein it was held that the heir of Thomas took no interest. It may be proper to add that the property in contest is all real estate.

Judgment reversed.

SAULSBURY, RESPASS & COMPANY *et al.*, plaintiffs in error,
vs. H. & F. BLANDY, defendant in error.

1. Where the defendants agreed to accept a draft drawn by a third person in favor of the complainants, payable six months after date, given for a steam engine purchased by the drawer, a bill against them cannot be sustained for failing to accept a draft totally different on its face from the one agreed on, though it may be alleged that it was the instrument contemplated by the parties.
2. If it had been alleged that the draft attached to the bill was the same instrument that the defendants agreed to accept, and that upon the faith of such agreement the engine was delivered to the drawer, that would have been such a part performance by the complainants as would have required a performance of their contract upon the part of the defendants, and would have prevented them from pleading the statute of frauds.

Saulsbury, Respass & Company *et al.* vs. Blandy.

Equity. Bills of exchange. Contracts. Statute of frauds. Before Judge HILL. Bibb Superior Court. April Adjourned Term, 1874.

For the facts, see the decision.

POE, HALL & LOFTON; E. F. BEST, for plaintiffs in error.

LANIER & ANDERSON, for defendants.

WARNER, Chief Justice.

This was a bill filed by complainants against the defendants, in which they alleged that in September, 1871, one Wimberly proposed to purchase of complainants' agent, Parker, a steam engine which he had for sale for them; that complainants' agent and Wimberly agreed on the price of the engine, the same being \$1,170 21. Wimberly wanted the engine on a credit of six months, to which the complainants' agent agreed, upon his giving security. Complainants' agent, Parker, and Wimberly, had an interview with Saulsbury, Respass & Company, warehousemen and cotton factors, concerning the proposed sale of the steam engine as aforesaid, when they agreed to accept the draft of said Wimberly for the amount of the purchase money of said engine, on presentation, a copy of which draft is attached to complainants' bill as an exhibit. Complainants allege that upon the faith of this agreement to accept the draft of Wimberly for the price of the engine, the same was delivered to him, and on the first of October thereafter, 1871, the draft contemplated in said agreement was presented to Saulsbury, Respass & Company for acceptance, when they refused to accept the same, although informed of the delivery of the engine to Wimberly under their promise to accept Wimberly's draft for the purchase money therefor, and that Wimberly is insolvent. The draft attached to the complainants' bill as an exhibit was drawn by Wimberly, payable to his own order, six months after date, for provisions and commercial manures, to make a crop for the year 1872, and

created a lien on his crop for that year for the payment thereof. The defendants demurred to the complainants' bill, the court overruled the demurrer, and the defendants excepted.

1. There is nothing in this draft which it is alleged the defendants refused to accept, going to show that it was for the purchase money of the steam engine sold by complainants' agent to Wimberly, but on the contrary, it appears on the face of it that it was drawn upon the defendants by Wimberly for provisions and commercial manures to make his crop for the year 1872. Assuming that the defendants did agree to accept a draft drawn by Wimberly upon them for the price of the engine, and that the same was delivered to Wimberly on the faith of that agreement, still, the draft which it is alleged the defendants refused to accept, attached to the complainants' bill, is not a draft of that description. The draft which the defendants refused to accept, set forth in the complainants' bill, is not drawn by Wimberly in favor of the complainants or their agent, and does not purport on its face to be for the purchase money of the engine, and the court could not have presumed that it was, because it is expressly stated on the face of the draft that it was drawn on the defendants for a different consideration, to-wit: for provisions and commercial manures to make a crop for the year 1872. The defendants were not bound to accept that draft under their alleged agreement. The complainants do not allege that the draft attached to their bill, which the defendants refused to accept, was the same draft that they agreed to accept for the purchase price of the engine sold and delivered to Wimberly; that fact cannot be inferred from the face of the paper, and the allegations in the bill are to be taken most strongly against the complainants. It is true that the complainants allege that the draft presented to the defendants for their acceptance, was the draft *contemplated* in said agreement, but when the draft that was presented for the defendants' acceptance is compared with the alleged agreement, that allegation is not sustained. The bill was therefore demurrable because it was not alleged therein that the draft attached thereto,

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which the defendants refused to accept, was the same draft that they agreed to accept for the price of the engine.

2. If the complainants had alleged that the draft attached to their bill was the same draft that the defendants agreed to accept for Wimberly as the price of the engine, and that upon the faith of that agreement the engine was delivered to Wimberly, that would have been such a *part performance* of the agreement by the complainants as would have rendered it a fraud on the part of the defendants in refusing to comply with their agreement to accept the draft, and a court of equity would compel them to perform it on their part, and they would not be permitted to plead the statute of frauds to protect themselves from its performance: Code, sec. 1951. The statute was enacted to prevent fraud, and not for its encouragement or protection. In view of the allegations as contained in the complainants' bill, the overruling of the defendants' demurrer thereto was error.

Let the judgment of the court below be reversed.

MARY E. NOSWORTHY *et al.*, plaintiffs in error, vs. BRYANT BLIZZARD, defendant in error.

1. Public declaration by one who was the agent both of the representative of the estate and the purchaser of land sold at administrator's sale since the act of December 17, 1859, and which was made at the time of the bidding, that the sale was had to perfect title to the person for whom the land was bid off, renders the sale open to review at the option of the parties at interest.
2. If the purchaser shows that he gave the value of the land, and though it was not paid for in money, but in other property, yet, that the representative of the estate was a creditor thereof to the amount of such value, and relied on the same for the payment of her debt, and did in fact receive the property so paid, and never made any other collection of the debt from the estate, the purchaser may, in equity, protect his title to the extent that his purchase was of value to the estate.
3. But as this point, though urged on the argument before this court, was not made by the pleadings, or, so far as the record shows, was not presented at the trial, and the evidence thereon not being full and sat-

isfactory, (the court having ruled out the statement of the administratrix appended to her returns,) we do not feel authorized to sustain the verdict on this ground.

4. In a case controlled by the acts of December 10, 1807, and December 9, 1841, a widow who did not elect to take a child's part in the land of her husband's estate, within the time prescribed by said acts, was thereafter debarred from such right; nor can the defendant in this case set up such an interest as being in the widow from whom he purchased, for the purpose of protecting his title to that extent.

Administrators and executors. Principal and agent. Sales. Equity. Distribution. Election. Before Judge BARTLETT. Baldwin Superior Court. August Term, 1874.

This is the second time this case has been before this court. See 50 *Georgia Reports*, 514.

In 1853 William A. Moran, of Baldwin county, died intestate, leaving a widow, Eliza F. Moran, who, the same year, administered on his estate, and two children, James H., aged three years, and Mary E., (complainant) aged one year. Decedent, with other property, owned two hundred and eighty-five acres of land in said county, the subject matter of this litigation.

The widow, the administratrix, has never applied to the ordinary for dower or a child's part of said estate, but in January, 1856, filed her renunciation of dower. In 1860 the administratrix sold said land to Bryant Blizzard. In 1871 Mary E., was married to Daniel Nosworthy; in January, 1872, James H., Mary and her husband, sued Blizzard, in ejectment, for the land. James H. died in December, 1872; at November adjourned term, the ejectment was tried, a verdict for defendant rendered, and a new trial granted, on the grounds that the verdict was contrary to the evidence and the charge of the court. At that trial Blizzard produced in evidence (on notice) a deed to said land to himself, from said Eliza F. Moran, administratrix, dated April 25th, 1861.

In January, 1874, Mary E. Nosworthy, the sole surviving heir of William A. Moran, deceased, (her husband joining)

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filed her bill for injunction and relief against said Blizzard and said administratrix, Eliza, in which she prayed a cancellation of said deed, and partition of said land, three-fourths of which she claimed by inheritance from her father and her brother. The grounds of cancellation are:

1st. That said deed is but a consummation of a *private sale* of land, by the administratrix, which was to be perfected by legal formality.

2d. That said sale was but a barter of land for slaves, for a change of investment, without lawful warrant.

The defendant, Blizzard, answered, in brief, as follows: In September or October, 1859, it was agreed between the administratrix, Eliza F. Moran, and defendant, that he was willing to give for said land the same price it was appraised at previously by the sworn appraisers of the estate, viz: \$1,400 00, and would at lawful public sale of the land bid that price for it, and if nobody else would bid higher, then that it should be knocked down to defendant.

And further, as that bid, \$1,400 00, was probably the very highest bid that could be got, and so he would be sure to get the land, it was then, at the same time, agreed verbally that at the end of the year 1859, when Fayette I. Echols' rent year should be out, and after his removal from the place, then, immediately, without any more renting out, this defendant, Blizzard, might move on said land and take possession thereof and use it without rent and without waiting for a public sale of it, and that the administratrix would go on and get leave of the ordinary to sell the land, and would then sell the same according to law, to the highest bidder, and that defendant should bid said appraised price, \$1,400 00, on the credit and terms of sale aforesaid, but subject nevertheless to be outbid by a higher bidder.

And defendant further says, that according to that agreement of October or September, 1859, he did enter on said land on the 28th of December, 1859, as soon as said Fayette Echols, tenant of that year left; and that he has lived there ever since—over fourteen years—and that according also to

that agreement, said administratrix did go on and obtain fairly and without fraud, so far as defendant knows or believes, lawful leave of the ordinary of said county, to sell said land according to law, and did afterwards actually sell it according to law, fairly, publicly, before the court-house door, on the first Tuesday in May, 1860, in lawful sale hours, after due advertisement according to law, to the highest bidder—and that this defendant's bid of \$1,400 00 (payable in money, and not in negroes or anything else) was made on the terms aforesaid, and as no person bid higher, it was knocked down to his bid and he gave his note for \$1,400 00, and got her bond for titles according to the terms of sale and agreement—which note he afterwards, on 10th July, 1860, paid off in valuable property, as aforesaid, which he, on that day, 10th July, 1860, and never before, bargained and sold to her for \$1,600 00.

M. R. Bell, former ordinary, testified that the records and files of the ordinary's office contained no application for dower or child's part of W. A. Moran's estate, by the widow, Eliza F. Her recorded return, as administratrix, of 8th January, 1856, showed a renunciation of dower.

Joseph J. Simpson and Everett E. Stanley testified that they were at the public sale, on 3d May, 1860; that A. H. Kenan read aloud the advertisement, and proclaimed that the sale was to perfect titles to Bryant Blizzard at \$1,400 00; that Ennis, sheriff, cried the property; that Kenan made the only bid, \$1,400 00, and the property was knocked off to that bid, to Blizzard. Simpson stated that he knew of the private sale before that day.

The following paper, produced by defendant, on notice, was read in evidence:

“MILLEDGEVILLE, 10th July, 1860.

“This is to show that Mrs. Eliza Moran and Bryant Blizzard have this day bargained, to-wit: Mrs. Moran, as administratrix, and by the consent of the ordinary, agrees to give the tract of land belonging to the estate of William Moran, and upon which Blizzard is residing, and one hundred and

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fifty dollars besides, payable on the 25th December next, for a negro woman, Corinna, and her male child, about four years old—the title and health of said negroes, he, Blizzard, warrants, and Mrs. Moran warrants and defends the title to the land, said land containing two hundred and eighty-five acres, more or less.

“A. H. KENAN,

“*Attorney for Mrs. Moran.*

“B. BLIZZARD.”

“As soon as the ordinary passes the order which he has agreed to do, then mutual titles to be made.

“KENAN, *for Mrs. Moran.*

“B. BLIZZARD.”

The following was read in evidence :

“MILLEDGEVILLE, 5th July, 1860.

“Received of Eliza F. Moran, administratrix of the estate of William Moran, deceased, \$1,552 00, in full consideration for a negro woman, Corinna, and her male child, about four years old, the title and health of said negroes I warrant and defend unto the said Eliza F. Moran, her heirs and assigns.

“B. BLIZZARD.”

It was also shown that Kenan, at the sale of May, 1860, acted both as the agent of the administratrix and of Blizzard. The latter testified substantially to the facts set forth in his answer.

It also appeared in evidence that the estate was indebted to the administratrix, on January 18th, 1856, in the sum of \$1,155 16, and there was no proof that this amount had ever been paid, unless by the receipt of the negroes taken from Blizzard.

The court charged the jury, amongst other things, as follows:

“1st. If you believe from the evidence that the public sale of May 3d, 1860, was in pursuance of a private agreement that Blizzard should have the land at a stipulated price, and that said public sale was made for the purpose of perfecting

title by legal formality, then the whole transaction was illegal and void."

"2d. Eliza's deed, as administratrix, to Blizzard, is good, at least so far as to pass all her interest to him. Her interest at first was a child's part—one-third. Each child had one-third and on the death of James, the son, without widow or child, his one-third went equally to his mother, Eliza, and his sister, Mary. After that the mother's share was one-third and one-half of one-third—one-half of the whole, and if Mary Nosworthy has any right at all, it is to one-half of said land only."

The jury found a verdict for the defendant. The complainants moved for a new trial because the verdict was contrary to the evidence, the law, the charge of the court, and because the court erred in the second proposition of the aforesaid charge.

The motion was overruled, and the complainants excepted.

CRAWFORD & WILLIAMSON, for plaintiffs in error.

WILLIAM MCKINLEY, for defendant.

TRIPPE, Judge.

1. The act of December 17, 1859, makes valid all sales of real estate theretofore made by executors, administrators, etc., by private contract, and afterwards advertised and sold at public outcry for the purpose of perfecting titles. The sale in this case was made at public outcry, after the passage of that act, to-wit: in May, 1860. It appears that the person who bid off the land for defendant in error was both his agent and the agent of the administratrix. At the time of the sale it was declared publicly that it was made to perfect titles to the defendant in error. We think this brings the sale within the rule that makes such sales open to review at the option of the parties at interest: Code, section 2566; and that under the evidence there should be a rehearing of the case.

2. If such a purchaser can show that he gave the value of the land, and that though it was paid for in other property,

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yet the administratrix was a creditor of the estate to the amount of such value, and did in fact receive the property in which payment was made, and never made any other collection of her debt from the estate, he can, in equity, protect his title to the extent that his purchase was of benefit to the estate. This principle is always recognized where one has dealt with a trustee, and the beneficiaries of the trust estate have had the benefit of what was received from him. Although his contract with the trustee may not be legal and valid, yet he has a right to reimbursement to the extent of what he has added to the trust estate, or to the extent that the *cestui que trusts* have had the benefit of his property.

3. But the difficulty with the defendant in error is, that the evidence did not sufficiently show such a state of facts as will authorize him to claim the benefit of this rule. There was a statement in writing appended by the administratrix to her returns, looking that way, and this statement appears in the record. But it also appeared that it was ruled out as evidence, upon being objected to, and of course the defendant can take no benefit from it in this court.

4. The further question was presented, whether a widow who did not elect to take a child's part in the land of her husband, was thereafter debarred by the acts of December 10th, 1807, and December 9th, 1841, from asserting that right. This case is controlled by those acts, the husband having died in 1853, intestate. By both of said acts it is declared that if a widow shall fail to make her election out of the estate of her husband within the time prescribed, she shall be considered as having taken her dower, and shall forever after be debarred from taking any other part. The act of 1807 makes the time within which this election is to be made, one year from the death of the husband. By the act of 1841 it is changed to one year after letters testamentary or of administration have been granted, and this latter act reaffirms the disability on her failing so to elect. The terms of both acts are clear and positive, and are a bar to the right of a widow to assert any claim to an interest except dower in these lands.

This being so, and she having been barred at the time the land was purchased by the defendant, he cannot set up such an interest in her for the purpose of protecting his title to that extent.

Judgment reversed.

JOSEPH GAULT *et al.*, plaintiffs in error, vs. H. B. WALLIS, defendant in error.

1. The act of 1811, which provides that where a defendant is discharged by a magistrate for the want of sufficient cause of commitment, such magistrate may, in his discretion, direct the costs to be paid by the prosecutor, though not embodied in the Code, not being inconsistent with any of the provisions thereof, is still of force.
2. A judicial officer acting within the jurisdiction conferred upon him by law, is not liable for errors of judgment, unless the result of malice or corruption.
3. It is competent for the superior court, upon the final decision of a case carried up by writ of *certiorari*, to direct the magistrate to refund the costs paid by the petitioner. Such magistrate, though insolvent, may be compelled to perform his official duty.
4. Courts of equity have no jurisdiction to interfere with the administration of the criminal laws of the state by injunction or otherwise.

Criminal law. Costs. Judge. *Certiorari*. Equity. Before Judge KNIGHT. Cobb Superior Court. March Adjourned Term, 1874.

For the facts of this case, see the decision.

W. T. WINN; W. D. ANDERSON, for plaintiffs in error

H. A. DUNWOODY; C. D. PHILLIPS, for defendant.

WARNER, Chief Justice.

This was a bill filed by the complainant against the defendants, praying for an injunction to restrain the defendants from the collection of two cost *fi. fas*. The injunction prayed for was granted, and when the cause came on for trial the defend-

Gault et al. vs. Wallis.

ants made a motion to dismiss the complainant's bill because the allegations contained therein did not entitle the complainant to any relief by the decree of a court of equity, which motion the court overruled, and the defendants excepted. It appears from the allegations in the bill that the defendant, Gault, was a justice of the peace, and the defendant, Wilson, was his constable; that the complainant had applied to Gault for a warrant against Bell and wife, charging them with keeping and maintaining an ill-governed and disorderly house, which was duly issued by the justice, the parties arrested and brought before him. The ground of complaint made in the bill against the justice is, that on the hearing of the charge made by the complainant against Bell and wife, although there was sufficient evidence that they did keep and maintain an ill-governed and disorderly house, justice Gault refused to bind them over to appear at the superior court to answer said charge, but, on the contrary, dismissed the complaint and entered up a judgment against the complainant for the costs in the case, issued an execution and placed the same in the hands of the constable for collection. The complainant also alleges that he sued out another warrant against Bell, alone, for a trespass in taking and carrying away a number of plank from the house and possession of complainant, of the value of \$2 00, more or less, without authority and contrary to law, and that justice Gault continued the last mentioned case on his own motion, for the purpose of procuring two other justices to sit with him on the trial thereof, but failed to do so, and finally dismissed said case and entered up judgment against the complainant for \$6 00 costs in that case, in violation of the laws of the state, and issued an execution therefor and placed the same in the hands of Wilson, the constable, all of which actings and doings of justice Gault the complainant alleges were illegal and void; that justice Gault and his constable are both insolvent, and therefore prays that they may be perpetually enjoined from collecting the illegal costs aforesaid.

1. By the 10th section of the act of 1811, (Cobb's Digest,

644,) it is declared, that "where any person or persons charged with any offense, and brought before a justice or justices of the peace, shall be discharged for want of sufficient cause of commitment, the justice or justices may, in his or their discretion, discharge the party with costs, or direct the costs to be paid by the prosecutor." Although this section of the act of 1811 is not embodied in the Code, it is not *inconsistent* with any provision thereof, and is therefore of force as a part of the law of this state.

2. As a general rule, a justice of the peace is not liable for errors of judgment when acting within the jurisdiction conferred upon him by law. The complainant does not allege in his bill that justice Gault acted *maliciously* or *corruptly* in rendering the judgments complained of. If he committed error in rendering the judgments complained of, that error might have been corrected by a writ of *certiorari* to the superior court.

3. But it is said that if the complainant had sued out a *certiorari* he would have had to pay the cost, and the justice being insolvent, he could not have recovered it back if the *certiorari* had been sustained. The reply is, that although he might not have been able to have recovered the costs by an execution against the property of the justice, still the costs would have been in the hands of the justice, not as his private property, but held by him in his official capacity to abide the decision of the court upon the *certiorari*, and as there was nothing but the costs involved, it would have been competent for the superior court, under the 4067th section of the Code, to have made a final decision of the case, and to have ordered the justice to have restored the costs in his hands to the plaintiff in *certiorari*. It does not necessarily follow that because a justice of the peace is insolvent, that he cannot be compelled by the judgment of the superior court to perform his official duty, and be compelled to obey the orders of that court.

4. This was a proceeding under the criminal law of the state, and we know of no principle of equity jurisprudence which confers upon a court of equity jurisdiction to interfere

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with the administration of the criminal laws of the state by injunction or otherwise. For a court of equity to assume jurisdiction in criminal cases, and enjoin the judgments of the courts would be a novel and dangerous precedent to establish. In our judgment, the motion to dismiss the complainant's bill for want of jurisdiction should have been allowed.

Let the judgment of the court below be reversed.

JOSHUA L. HARRIS *et al.*, *caveators*, plaintiffs in error, vs.
JAMES M. HARRIS *et al.*, propounders, defendants in error.

1. When the instructions of the court to the jury embrace many distinct questions of law, an exception to the whole charge is too general, and cannot be considered. Justice to the opposite party and to this court, requires that there should be a specification of the errors which are intended to be complained of.
2. This well settled rule should be the more strictly adhered to where the record does not contain the evidence in reference to the points on which those portions of the charge were founded that are proposed to be argued as being erroneous.
3. On the trial of an issue of *devisavit vel non*, an executor or legatee is a competent witness.
4. If a testator can read and write, his signature is usually sufficient evidence of his knowledge of the contents of the paper signed as his will.
5. The further provision of law that greater proof is necessary to show such knowledge if the will be written by one who takes a large benefit under it, does not require that the evidence shall be conclusive.
6. And if the court charged that in such a case there should be strong proof that the testator knew the contents, and assented to them, it was not error to refuse to charge that the evidence should be both strong and conclusive.
7. When the issues made by the *caveat* are undue influence—and that the testator did not know the contents of the will when it was signed, and it appears that the will had been written prior to the time of the execution, and was signed by the testator after it had been read over to him, and there were certain words in the will which it was claimed were in a different handwriting from the body of the instrument, it was not error in the court to refuse to charge that if upon inspection of the paper, the jury should think it had been altered, they should treat that as a circumstance of suspicion

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against the will and to charge in lieu thereof, that it was a circumstance they might consider in coming to a conclusion as to the validity of the will.

8. A refusal to charge a request which includes a hypothesis of facts not authorized by the evidence, is not a ground of error.

Practice in the Supreme Court. Charge of Court. Witness. Wills. Administrators and executors. Legacies. Before Judge STROZER. Early Superior Court. April Adjourned Term, 1874.

James M. Harris and Howell J. Harris, as executors, propounded the following will for probate:

“GEORGIA—EARLY COUNTY: In the name of God, Amen.

“I, Joshua Harris, of the county of Early, in said state, being aged and infirm but of sound mind and disposing memory, do make, publish and declare this to be my last will and testament, hereby revoking all other wills or codicils by me heretofore made.

“Item 1st. I give my soul to Him that created it, and desire that my body be buried in the usual christian style, and that all my just debts be paid by my executors hereafter named.

“Item 2d. I give and bequeath unto my daughter, Sarah E. King, wife of Dr. J. J. King, \$20 00 in money.

“Item 3d. I give and bequeath unto my dear daughter Nancy Jane Jenkins’ children, \$20 00 in money.

“Item 4th. I give and bequeath unto my son, Joshua L. Harris, \$20 00 in money.

“Item 5th. I give and bequeath unto my dear son John W. Harris’ children, \$150 00 in money.

“Item 6th. I give and bequeath unto my dear daughter Caroline Sales’ children, \$150 00 in money.

“Item 7th. I give and bequeath unto my two sons, H. J. Harris and James M. Harris, all of my stock, hogs, cows, sheep, mules and horses; also, all of my land and appurtenances thereto belonging, and all my notes and money not disposed of.

“Item 8th. I do hereby appoint my sons, Howell J. Har-

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ris and James M. Harris, executors to this my last will and testament, and charge them as such to carry out the same.

"In testimony whereof, I have hereto set my hand, this the 1st day of August, 1867.

(Signed)

"JOSHUA HARRIS."

Attested in the usual manner by John Gilbert, Malcolm N. Averett and Augustus J. Mercier.

Joshua L. Harris and other heirs-at-law of the testator entered a *caveat* upon the following grounds:

1st. Because, at the time of the execution of the instrument propounded, said Joshua Harris was not of sound and disposing mind and memory, but was in a state of mental imbecility, and by law incapable of disposing of property.

2d. Because said Joshua Harris was induced to make the provision contained in the seventh item of said instrument by the undue influence and improper control of the propounders.

3d. Because said deceased, at the time of the execution of said instrument, was laboring under an insane delusion or hallucination as to *caveators*.

4th. Because the propounder, James M. Harris, one of the principal legatees under said instrument, and one of the executors, drafted the same, and the deceased did not know its contents at the time of the execution.

The ordinary admitted the instrument to probate, and the case was carried by appeal to the superior court. In the course of the trial in the last mentioned tribunal, the propounder, James M. Harris, offered himself as a witness. He was objected to on the ground that the paper tendered for probate was drafted by him, while the issue on trial was whether such instrument was freely and voluntarily executed by the deceased, or whether he had been imposed upon or unduly influenced by the witness offered, and Joshua Harris, the other party to this transaction; being dead, he was incompetent. The court overruled the objection except as to what had passed between the witness and deceased. To this ruling *caveators* excepted.

This witness was asked by counsel for propounders as to the state of deceased's mind and memory prior to, at the time of, and after the execution of said instrument. To these questions *caveators* objected. The objection was overruled, and they excepted.

Caveators requested the court to charge the jury as follows: "If you believe from the evidence that the paper offered for probate was written by some other person prior to the time the same was signed by the deceased, and that the person writing it takes a large benefit under it, then the law casts upon the propounders the burden of proving by strong and conclusive testimony that the will was read to the testator, that he did hear it and understand its contents, and that he did assent to it."

The court charged upon this point, in its general charge, as follows: "When a will is prepared by one who takes a large benefit under it, it cannot be set up without strong proof that testator understood its provisions and assented to them."

The request was refused, and *caveators* excepted.

Caveators requested the following charge: "If you believe from an inspection of the will that the same was altered in any material part, and that the same was done in a different handwriting from the main body of the will, it is a circumstance of suspicion against the will which the jury may consider, in connection with other testimony, in determining whether this paper is the will of the testator."

The court charged in lieu of the last portion of the request, "it is a circumstance which you can consider in coming to a conclusion as to the validity of the will." To this modification *caveators* excepted.

They further requested the court to charge as follows: "If you believe from the evidence that the paper offered as a will was signed by the testator, and that he had testamentary capacity, then you may inquire from the testimony whether there was any undue influence exerted over him by which he was induced to make a will different from what he would otherwise have made. Relationship, affection, preference be-

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tween children or kindred, or kind treatment, are not sufficient in themselves to amount to undue influence. But if you believe from the evidence that the testator was old and infirm; that all his children had left him, and were living apart from him, except one; that that one was his son; that the testator had relinquished the management of his business into the hands of that son, and that he acted under the influence and control of that son, then it is the duty of the jury to scan closely all the evidence, and for this purpose they may consider slight circumstances in order to determine whether there was undue influence exerted by that son over him."

The court refused thus to charge, and *caveators* excepted.

The bill of exceptions contained the entire charge of the court, with a general exception thereto. Detached portions of the testimony were incorporated. The conclusions of counsel for *caveators* upon other parts of the evidence were also set forth, but no entire brief of the testimony was sent up. No motion for a new trial was made. Error was assigned upon each of the above grounds of exception.

H. & I. L. FIELDER; R. H. POWELL, for plaintiffs in error.

A. HOOD; JOHN C. RUTHERFORD; G. B. SWANN, for defendants.

TRIPPE, Judge.

1. There was a general exception to the entire charge of the court. The charge embraced many distinct questions of law. In *Smith et al. vs. Atwood*, 14 Georgia, 404, and frequently since, it was held that such an exception is not proper, but the plaintiff, in assigning error, must specify the portions of the charge to which he excepts. In behalf of this rule it may be said, that justice to the opposite party and to this court requires that there should be a specification of the errors which are intended to be complained of.

2. In this case this rule should be specially adhered to.

Certain portions of the charge were proposed to be argued as being erroneous, and the record did not contain the evidence on which those parts of the charge were founded. The difficulty of intelligently and properly considering such is apparent, and great injustice might result from the attempt to do so.

3. There is nothing in the evidence act of 1866 which excepts from its operation an executor or legatee who is offered as a witness on the trial of an issue of *devisavit vel non*: See 36 *Georgia*, 568.

4, 5. Section 2418 of the Code declares: "In all cases, a knowledge of the contents of the paper by the testator is necessary to its validity; but usually, when a testator can read and write, his signature or the acknowledgement of his signature, is sufficient." The same section further provides: "If, however, the scrivener or his immediate relations are large beneficiaries under the will, greater proof will be necessary to show a knowledge of the contents by the testator."

6. The court, in this case, charged the jury upon this latter clause of this section, that there should be strong proof that the testator knew the contents of the paper and assented to them, and declined to charge that the evidence should be both strong and *conclusive*. This cannot be error. The statute does not require that in such a case the evidence must be conclusive. Such a test of the strength of evidence is hardly exacted in any case. The Code says *greater proof* will be necessary. That does not mean conclusive. When the judge, in connection with this section, told the jury that the proof should be strong, and declined to use the word conclusive, he met all the law required of him.

7. Upon the exception to the charge in reference to the matter of alleged alteration, it is sufficient to say that it was left fairly to the jury. Under the evidence on this point, it was a question not for the court to decide, that an apparent difference in the handwriting of a line or two of the will was a circumstance of suspicion against the will. It was sufficient to say that it was a circumstance they might consider in

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coming to a conclusion as to its validity. The testimony did not authorize the court to go farther than it did.

8. A great portion of the last request made by the *caveator* for the court to charge, was included in the general instructions which had already been given to the jury. There was another part of it which included a hypothesis of facts not authorized by the evidence. It is never error to decline to charge such a request. A charge of the court, and all parts of it, should grow out of the proof before the jury.

Judgment affirmed.

RICHARD BELL *et al.*, plaintiffs in error, vs. WILLIAM WOOTEN *et al.*, defendants in error.

A parent cannot recover for the homicide of his son without alleging facts showing pecuniary damage to have been sustained by him.

Parent and child. Damages. Before Judge KNIGHT. Cobb Superior Court. November Term, 1874.

This case is reported in the decision.

IRVIN, ANDERSON & IRVIN; GEORGE N. LESTER; WILLIAM PHILLIPS, for plaintiffs in error.

C. D. PHILLIPS, for defendants.

WARNER, Chief Justice.

This was an action brought by the plaintiff against the defendants, as physicians and surgeons, who undertook to amputate the leg of the plaintiff's son, and did it in such an unskillful and negligent manner as to cause his death, by means of which unskillful and negligent conduct the plaintiff alleges he has sustained damage in the sum of \$20,000 00. The defendants demurred to the plaintiff's declaration as being insufficient in law to authorize a recovery to be had against

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them on the allegations contained therein. The court overruled the demurrer, and the defendants excepted. The plaintiff seeks to recover damages from the defendants for the homicide of his son. It is not alleged in the plaintiff's declaration that his son was a *minor*, and that he was entitled to his services as such minor, and therefore, he is not within the decision made by this court in *Shields vs. Yonge, superintendent, etc.*, 15th Georgia Reports, 349. It is true, the plaintiff alleges that his son was in his employment under a contract, but for what length of time, or what was the value of his services under that contract, is not alleged, nor is it alleged what pecuniary damages the plaintiff has sustained by the death of his son, under that contract, even if he would be entitled to recover against the defendants for the loss of the services of his son under a contract as set forth in his declaration. This case comes within the ruling of this court in the case of *The Georgia Railroad and Banking Company vs. Wynn*, 42d Georgia Reports, 331. In our judgment, the court erred in overruling the demurrer to the plaintiff's declaration.

Let the judgment of the court below be reversed.

WILLIAM L. HADLEY, plaintiff in error, vs. C. B. BEAN *et al.*, defendants in error.

1. A, being in possession of land, died, and his executor sold and conveyed by deed to B, who entered and held possession for four years. B then executed a deed to C, and subsequently C conveyed by deed to D, and D to plaintiff:

Held, that this is sufficient to put the defendant upon proof of title, or to show that he did not acquire possession "by mere entry, and without any lawful right whatever."

2. In order to introduce in evidence copies of deeds which have been recorded, it should be shown that the originals have been lost or destroyed, or that all reasonable means to obtain them have failed. And in this case it should appear that notice was given to the opposite party to produce them, or that it was proved by him that they are not in his custody or control.

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Ejectment. Title. Evidence. Before Judge HOPKINS.
Fulton Superior Court. April Term, 1874.

Hadley brought complaint against C. B. Bean and N. A. Bean for a lot of land in the city of Atlanta. The plaintiff introduced in evidence the following conveyances to the land in controversy :

1st. Deed from L. L. Abbott, executor, to E. R. Sasseen, dated February 4th, 1863.

2d. Deed from E. R. Sasseen to Holmes Sells, dated February 22d, 1867.

3d. Deed from Sells to George Hoover and A. N. Hadley, dated February 23d, 1867.

4th. Deed from Hoover and wife to the plaintiff, conveying one-half the premises in dispute, dated September 17th, 1868.

5th. Deed from Hadley and wife to the plaintiff, conveying the other half, dated April 6th, 1869.

Sasseen testified that he held possession of said land from February 4th, 1863, until February 22d, 1867:

Plaintiff here closed, when defendant moved for a non-suit. Plaintiff insisted that he had made out a *prima facie* case, but offered to establish a statutory title if the court deemed such proof necessary. The court so held, and the plaintiff, after endeavoring to account for the absence of the originals, tendered certain copy deeds in evidence. The defendants objected to the preliminary showing as insufficient.

The plaintiff failed to show that he had notified the defendants to produce such original deeds. It appeared that the latter claimed under a sale of the property as belonging to George Hoover, for taxes.

The objection was sustained, and the plaintiff excepted.

A. C. Wylly testified that A. W. Abbott was in possession of the land prior to its sale by his executor, L. L. Abbott, to E. R. Sasseen.

Plaintiff again closed, when the motion for a non-suit was renewed. The plaintiff introduced a deed from the city mar-

shal of Atlanta to W. C. Lawshe, dated November 3, 1870, by which the property in controversy was sold as the property of George Hoover to W. C. Lawshe, the deed reciting that it was a tax sale. Then the motion was allowed. After that, plaintiff's attorney asked leave to withdraw the marshal's deed, and it was granted. This deed was produced by defendants on notice from plaintiff.

To the judgment awarding a non-suit the plaintiff excepted.

Error is assigned upon each of the aforesaid grounds of exception.

Z. D. HARRISON; R. H. CLARK, for plaintiff in error.

HILLYER & BROTHER, for defendants.

TRIPPE, Judge.

1. All that we decide in this case is that there was sufficient evidence to put the defendants upon proof of title or to show that they did not acquire possession by mere entry without any lawful right whatever. Abbott was in possession of the land at the time of his death. His executor conveyed by deed to Sasseen who went into possession and so remained for four years, when he sold to Sells and made him a deed. Deeds were made to subsequent vendees, until the plaintiff's was executed. We think this was enough to cast the burden on defendants. Tyler, in his work on Ejectment, page 71, says "if the claimant shows a prior possession upon which the defendant entered without its having been formally abandoned as derelict, the presumption which arose from the tenant's possession is transferred to the prior possession of the claimant, and the tenant, to recall that presumption must show a still prior possession, and so the presumption may be removed from one side to the other *toties quoties*, until one party or the other has shown a possession which cannot be overruled, or puts an end to the doctrine of presumption founded on mere possession, by showing a regular legal title or a right of possession." On the

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next page he further says, "although the general rule is that a claimant must recover on the strength of his own title, this has been modified, and the court regards the better right as between the parties, to be vested in the first possessor, and grantees claiming through him." Many authorities are cited to sustain this, though many of them do not go to the full extent of the statement by Tyler: See 12 *Georgia*, 469; 30 *Ibid.*, 652. Section 3366 of the Code declares a plaintiff in ejectment may recover the premises in dispute upon his prior possession alone, against one who subsequently acquires possession of the land by mere entry, and without any lawful right whatever. This was recognized to be the rule in this state before the adoption of the Code. The question in this case is, was the *onus probandi* cast upon the defendant? As far as I am prepared to go, and that is with some hesitation, is to hold that where the plaintiff shows possession in himself under a deed to the premises, or a deed to himself from his grantor who was in possession, as was proved in this case, the burden is cast on the defendant to show he is not a trespasser, that he has not acquired possession by mere entry without any lawful right whatever. I am not willing to say that proof of mere naked prior possession casts the burden. Nor do I think that the authorities go that far. Some *dicta* seem so to declare, but upon investigating the cases, something further appears, either that the prior possession was under circumstances similar to those in this case, or the defendant was affirmatively shown to be a trespasser, or in without any claim of right: See 5 *Georgia*, 39. Whether there had been such abandonment of the possession by plaintiff or his grantors as to deprive him of the benefit of the rule announced, does not appear—nor is it a question which is determined by the judgment in the case.

2. The copy deeds were properly excluded. In order to introduce them in evidence it should have been shown that the original were lost or destroyed, or that all reasonable means to obtain them had failed. And in this case, it should have appeared that notice to produce the originals was given

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to the appointed party, or to have proved by him that they were not in his custody or control. Plaintiff showed no connection between his title and those deeds, so far as it appears from the record, and it might well be that the defendants themselves set up title under the deeds and had them in possession. A new trial is granted on the first ground.

Judgment reversed.

THE HOWARD MANUFACTURING COMPANY *et al.*, plaintiffs
in error, vs. THE WATER LOT COMPANY, defendant in
error.

1. Where a lot conveyed to the defendant was, by the deed, made permanently chargeable, in the hands of said defendant, or his heirs or assigns, with a proportionate part of an expense to be incurred by the complainant, such charge constituted a covenant running with the land and attached to it wherever the title might be.
2. The distinction between mere personal covenants and covenants running with the land, is this: in the former, the covenant has no relation to the land conveyed; in the latter, the covenant relates directly to the land and follows it into the hands of assignees.
3. Where a complainant relies upon a written contract it must be set forth in the bill or attached thereto as an exhibit.

Covenants. Land. Title. Equity. Exhibits. Before
Judge JAMES JOHNSON. Muscogee Superior Court. No-
vember Term, 1874.

For the facts, see the decision.

R. J. MOSES; BLANDFORD & GARRARD, for plaintiffs in
error.

H. L. BENNING, for defendant.

WARNER, Chief Justice.

It appears from the record in this case that on the 13th De-
cember, 1859, Van Leonard, trustee of the Howard Manufac-

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turing Company, recovered a judgment in the superior court of Muscogee county *vs.* the Water Lot Company, for breach of covenant—damages, \$3,033 00 and costs. An execution was issued on this judgment on 18th September, 1867, and the present bill was filed to enjoin its collection on 21st December, 1868.

On the 23d June, 1873, Jesse J. Bradford, trustee, was made a party in place of Van Leonard, trustee, deceased.

On the 21st May, 1871, defendant filed a demurrer, and on the same day filed a plea setting forth that the suit on which said judgment was founded had been transferred by the Howard Manufacturing Company to R. J. Moses, for the benefit of divers judgment creditors of said company, amounting to \$11,000 00, and that the proceeds collected upon said judgment were to be paid *pro rata* to said creditors, less one-fourth the amount of the same, which was to be retained by him for his fees. This assignment was made in 1854. The court overruled this plea, but directed that R. J. Moses should be made a party, which was done, and the bill amended June 23d, 1873.

At the November term, 1874, defendant moved to dismiss the bill for want of equity and on the special ground of demurrer filed at May term, 1871.

The court overruled the demurrer on both grounds, and this is assigned for error.

The following are the grounds of equity set forth in the bill: That the Water Lot Company, July 9th, 1847, conveyed by deed to Van Leonard, as trustee of the Howard Manufacturing Company, water lot eleven, containing the following covenants—the deed is set forth, and after conveying the property for \$5,000 00, contains this clause:

“And it is agreed and understood between the parties that this grant is subject to the following conditions and restrictions, to-wit: That the buildings which may be erected by the said Van Leonard, trustee, his heirs or assigns, on said lot number eleven, shall be fire-proof inside, and shall be equi-distant from the north and south lines of said lot; shall

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not exceed fifty feet in width, so that there shall be an open space of eleven feet between the walls of the building and the boundary lines.

“And further: That the said lot in the hands of the said Van Leonard, trustee, as aforesaid, or his heirs or assigns, shall be and is hereby made permanently chargeable with one-nineteenth part of the expense of repairing the dam across said Chattahoochee river and said canal or reservoir.

“And the said Water Lot Company hereby covenants with the said Van Leonard, trustee, as aforesaid, his heirs and assigns, that they will not bargain or sell any of their lots undisposed of except upon condition that the buildings which may be erected shall be equi-distant from the boundary lines as hereinbefore expressed; and further, that the said Van Leonard, trustee, aforesaid, his heirs and assigns, shall be entitled to use the water commanded by said dam and said canal or reservoir, in proportion to the number of lots in said survey now improved, or which may be hereafter improved, and when all of said lots—nineteen in number—shall be improved, the said Van Leonard, trustee, his heirs and assigns, shall be entitled to use one-nineteenth part of all the said water commanded by said dam and canal, which water shall be taken from said canal and conducted across the water passage in flumes or aqueducts in such manner as not to impede or obstruct the passage of the water through said water-way from the machinery above said lot eleven.”

There are further covenants not to allow any buildings erected than such as Van Leonard is permitted to erect.

The *habendum* is to Van Leonard, in trust for the stockholders of the Howard Manufacturing Company, their heirs and assigns, forever.

The deed is signed :

[L. 8.]

“JOHN H. HOWARD, *President.*

“JOHN B. BAIRD,

“W. L. JETER,

“FARISH CARTER, *Directors.*”

The bill further alleges that at the same time another agreement was made, under seal, between the same parties, (of which agreement no copy is attached,) but the bill alleges it was covenanted and agreed that the said Van Leonard, trustee, shall blast out the water-way opposite lots twelve and eleven to the width of sixty feet, and the depth of what at the time was the depth of said waste-way opposite to each or any of said lots; denies that Van Leonard or the Howard Manufacturing Company kept any of its covenants; alleged that the buildings were not equi-distant and were not fire-proof; that there was not an uncovered space of eleven feet, and that although the Water Lot Company in 1866 and 1867 expended \$57,979 46 in repairing said dam and canal, neither the said Van Leonard nor the Howard Manufacturing Company has paid any part; that one-nineteenth is \$3,051 00, which they claim to set off against the judgment of Van Leonard; and that by failing to blast out the race-way, or to build the buildings according to the conditions, they were damaged \$2,000 00, or other large sum; that the Howard Manufacturing Company became indebted to Mitchell and others, and that the lot was sold under a *fi. fa.* by Rutherford, sheriff, on the 5th April, 1853, and under other *fi. fas.*, subject to incumbrances of mortgages and bonds, equal to the value of the lot, which, therefore, only brought \$3 00; and that no notice of this covenant to repair was given to the purchaser or proclaimed at the sale; that Van Leonard, the trustee, is dead, and the Howard Manufacturing Company had ceased to do business since 1856; has no property out of which to satisfy the claims of the Water Lot Company, and has no officers through whom it could be sued or served, and prays that the Howard Manufacturing Company may account for the matters aforesaid; that the said *fi. fa.* shall be satisfied, and a decree rendered against the Howard Manufacturing Company for balance. Prays for injunction and subpœna. The sheriff was also made a party, and upon this bill an injunction was granted December 19th, 1869, which is still of force.

1. The question in this case is, whether the complainant,

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by its bill, on the allegations contained therein and the exhibit attached thereto, is entitled to have the interference of a court of equity to restrain the defendant from the collection of its judgment against the complainant. The main ground of the complainant's equity is that the defendant is indebted to it for damages in consequence of a breach of its implied covenant contained in the deed which it accepted from the complainant, set forth in the record, that the defendant is insolvent, and if the complainant shall be compelled to pay off the judgment it will be remediless to recover damages for the alleged breach of its covenant made with the complainant. Assuming, as the argument for the complainant does, that the defendant was bound in law by its implied covenant, it and its assigns, to pay one-nineteenth part of the expense of repairing the dam across the Chattahoochee river and said canal or reservoir, and that it has assigned that covenant to other persons, does it therefore follow that the complainant would be *remediless* to recover damages for a breach of that covenant? In our judgment, the one-nineteenth part of the expense of repairing the dam and said canal or reservoir was a *permanent charge* on lot number eleven unto whomsoever the title thereto might be conveyed or assigned. In other words, the charge upon the lot which the defendant covenanted should be a *permanent charge* thereon, runs with it, and the assignee of that covenant holds the lot subject to that charge upon it, and if the complainant has been damaged by a breach of that covenant, as alleged in its bill, it has an ample remedy against the assignees of that covenant under that title, for aught that appears from the allegations contained in its bill; and that being so, it was error in overruling the defendant's demurrer to the complainant's bill.

2. The distinction between mere *personal* covenants and covenants running with the land, is this; in the former, the covenant has no relation to the land conveyed; in the latter, the covenant relates directly to the land conveyed, sticks to it, and follows it into the hands of the assignees of the latter covenant. A court of equity will not enjoin the proceedings

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and processes of a court of law, unless there is some intervening equity or other proper defense of which the party complaining, without fault on his part, cannot avail himself at law: Code, section 3218.

3. The special demurrer to the complainant's bill, because it did not set forth the agreement referred to therein, for blasting out opposite lots eleven and twelve, for which the complainant claims damages, should have been sustained. The agreement should have been set forth or attached to the bill as an exhibit, so as to enable the court to judge of the legal effect thereof as to the defendant's liability thereon to the complainant, as claimed by it.

Let the judgment of the court below be reversed.

JAMES D. WADDELL *et al.*, plaintiffs in error, vs. RICHARD H. LEONARD, executor, *et al.*, defendants in error.

A testator, by the first item of his will, gave a specific legacy to his two grand-children, who were the children of a deceased daughter. By the second item he gave a child's share to his wife, and by the third and fourth items, certain legacies were given to each of his children as they married or arrived at age. The fifth item directed the residue of his estate to be kept together for the benefit of his wife and children until the youngest child married or arrived at age, and then to be equally divided amongst *his children and their representatives*. The seventh item provides that should any of his children die without issue, the portion of such children should revert to his estate and go to the surviving children and the representatives of such as may have departed this life:

Held, that the grand-children mentioned in the first item, being the representatives of a deceased daughter, took a share in the residue under the fifth item.

Wills. Before Judge JAMES JOHNSON. Talbot Superior Court. September Term, 1874.

On the 24th of May, 1857, James P. Leonard made his last will and testament, as follows:

In the first item he gave six negroes to Thomas H. Sparks, of Paulding county, to hold in trust to and for the separate

use and benefit of his two grand-children, Melora Sparks and James Martin Sparks, (children of a deceased daughter.)

In the second item he gave his wife, Martha Leonard, a child's part of his estate, with the privilege of taking such property as she might select.

In the third item he provided that as his children severally married or became of age, they were to receive \$5,000 00, the same to be held by trustees for their use, etc., and appointed Alexander Leonard and R. H. Leonard trustees.

In the fourth item he provided that as his children married or became of age, they were to receive each ten negroes, to be held by said trustees for their use and benefit.

In the fifth item he provided that after the payment of the legacies, the rest of the property belonging to his estate was to be kept together for the support of his wife and children, and the education of his children, until his youngest child became of age, then to be equally divided between his children and their representatives, share and share alike.

In the sixth item he provided that in the event his wife died before his youngest child became of age, his executor might divide the residue of his estate among his children and their representatives, share and share alike.

In the seventh item he provided that if any of his children died, leaving no child or children, the share of such child was to revert and go to his surviving children and the representatives of such as may have departed this life.

In the eighth item he appointed Alexander K. Leonard and Richard H. Leonard, trustees for his children, and provided that said trustees should hold the property given to his children for their sole and separate use.

Not long after the making of the will Mr. Leonard departed this life and Richard H. Leonard, one of the nominated executors, propounded it for probate in Talbot county, where it was proven and admitted to record, and letters testamentary issued.

The executor paid the specified legacies to all the legatees mentioned in the will, and in 1867, after the youngest child

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had become of age, he divided the residuum of the estate among the children of the testator, paying no part of it to the grand-children.

To the September term, 1873, of the superior court of Talbot county, Medora Sparks and James Martin Sparks, the grand-children, together with James D. Waddell, who had married Medora, filed a bill against the executor and the children for an account and settlement, claiming that under the will, they were entitled to a distributive share of the residuum of the estate.

Upon demurrer the bill was dismissed and complainants excepted.

L. E. BLECKLEY; BLANDFORD & GARRARD; WILLIS & WILLIS, for plaintiffs in error.

E. H. WORRILL; N. J. HAMMOND, for defendants.

TRIPPE, Judge.

There is no allegation in the bill of any facts *aliunde* the will, to aid in its construction, to-wit: nothing appears as to any advancement having been made to the mother of complainants, which added to the legacy given to them, would equalize that share with the share given in the third and fourth items to the living children. If such was the fact, if the intention of preserving *equality* in the division of testator's estate to all who were or had been the objects of his love and bounty could be shown, it would tend to strengthen the conclusion to which we have come. But it does appear that the testator did remember the children (the complainants,) of his deceased daughter, referred to them as such, and in the first item of his will gave them what was at the time a valuable legacy. The other children seem to have been under twenty-one years of age and unmarried—for the legacy to them, except a support, was to be enjoyed when they respectively married or attained the age of twenty-one. They were each to have, not only a larger portion of the specific kind of

property that was given to the grand-children than those grand-children took, but also the sum of \$5,000 00. It is quite probable that the purpose of the testator in this, was to preserve equality between them and what he had advanced to his deceased daughter in her lifetime, and had given to her children by the will. As his living children were to be maintained out of his estate until their marriage or majority, when they were to receive their allotted portions, the bequest to the grand-children was to go to their use at once.

After the youngest child became of age, the residue of testator's estate was to be divided equally between his children and their representatives, share and share alike. In determining that the grand-children took a share in the residue, we do not rest the construction on the ground that the term "children" included them. The rule is that the word "children," does not ordinarily comprehend grand-children, and only does so when the will would otherwise remain inoperative; or where the testator's intention is shown by other words, that the term was not used in its proper and actual meaning, but in a more extensive sense: 1 Rop. on Leg., 68. But here the testator goes further. He provides for an equal division of the residue between his children and their representatives. This is in the fifth item. In the seventh item where he provides for the disposition of such portions as might revert to his estate on the death of a child leaving no child or children, he directs that it shall go to his surviving children and the representatives of such as may have departed this life. It could scarcely be claimed that this last item would not include all deceased children, independent of the fact whether they died before or after the execution of the will; and it is not probable or reasonable that he would have included predeceased children in that item and excluded them in the other. It was said by the vice chancellor, in *Giles vs. Giles*, 8 Simons, 360, which will be again referred to, "in all cases like the present, it may be reasonably supposed that the testator intends as much to provide for his grand-children by a deceased

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child as he does for his grand-children by a child then living, but who may thereafter die."

In *Neave vs. Jenkins*, 2 Yeates, 414, the devise was of land to testator's three sons, John, Isaac and Joseph, "but if either of my sons die, having no child or children, after the decease of such son or sons, the land I have given them shall be equally divided among all my other children, or their heirs." There had been seven children, but one had died before the execution of the will, leaving a daughter. The point was not made in the case, whether, as her father died before the will was made, she was included at all--that seems to have been conceded. Another question was raised, that the limitation over was void on the ground that the contingency was too remote. But that was ruled in her favor, and it was held that the remainder was good by way of executory devise to a grand-daughter whose father died in the lifetime of the testator. It is so stated in the head-note to the case, and it seems that her right was not denied except on the ground stated. The case of *Jarvis vs. Pond*, 9 Simons, 549, was as follows: Testatrix had two sons and two daughters living, and another son and daughter, both of whom were dead at the date of the will, leaving children. She gave a legacy to each of the living children, and the residue to one of the daughters, Mary, and added, "and after her death I will that the said property be equally divided amongst such of my sons and daughters as may be living at the decease of the said Mary, and in case of the decease of any of my sons or daughters, the surviving children of any of my sons or daughters to have their father's or mother's part." It was held that the children of those who were deceased at the date of the will were entitled to share in the residue. So in *Giles vs. Giles*, *supra*, "the testator bequeathed his residue in trust for all his children living at the decease of his wife, and if any such children should die before his wife, and should leave issue, then the children of such, his son or daughter, should be entitled to the portion of such, his son or daughter, who might be deceased before the decease of his wife, provided that until the portion thereby provided for any

of the said children of his said sons or daughters who might have died before their mother, should become vested, it should be lawful for his trustees to apply the interest of the portion to which any such child might be entitled in expectancy for the maintenance of such child." The testator, at the date of his will, had four sons and one daughter, and he had another daughter who was then deceased, leaving children who survived the testator. Those children were held to be entitled to a share of the residue. Each of these cases illustrates that courts are quick to construe wills where there is ground for it, so that the issue of any child a testator may have or may have had, whether such child die before or after his death, shall participate in the bounty provided for his grand-children. It was in this latter case that the observation was made by the vice chancellor, which was quoted in reference to the intention of testators in the provisions they make for grand-children. There is nothing in this case why it should not apply to the parties under this will as well as any other. The bill should have proceeded to a hearing, and there was error in dismissing it.

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Jones <i>vs.</i> Wills Valley R. R. Co.	30th	"	123
Jones <i>vs.</i> The State	29th	"	198
Kahn <i>vs.</i> Herman	3d	"	572
Keaton & Hampton <i>vs.</i> Cox	26th	"	391
Kelly <i>vs.</i> Brooks	50th	"	351
Logan <i>vs.</i> Goodall	42d	"	323
Macon & Western R. R. Co. <i>vs.</i> Johnson	38th	"	17
Mason & Dickson <i>vs.</i> Croom	24th	"	400
Mayor & C. of Savannah <i>vs.</i> Wilson & Gibson	49th	"	640
McBryde <i>vs.</i> The State	34th	"	450
McDaniel, adm'r, <i>vs.</i> Hooks	30th	"	73
McDougall <i>vs.</i> Dougherty	12th	"	562
McHan <i>vs.</i> Stansell	39th	"	22
McLendon <i>vs.</i> Wilson & Callaway	52d	"	149
McLesky <i>vs.</i> Leadbetter	1st	"	468
McLean <i>vs.</i> Clark	47th	"	369
McPherson <i>vs.</i> The State	22d	"	573
Mechanics' Bank <i>vs.</i> Heard	37th	"	629
Milledge <i>vs.</i> Bryan	49th	"	212
Miller <i>vs.</i> Swift	39th	"	22
Mitchell <i>vs.</i> Addison	20th	"	600
Mitchell <i>vs.</i> Printup	19th	"	391

Mize <i>vs.</i> The State	49th	Ga., 452
Nagle <i>vs.</i> City C. of Augusta	5th	" 615
Nunn <i>vs.</i> The State	1st	" 475
Nutting <i>et al.</i> <i>vs.</i> Thomason <i>et al.</i>	46th	" 531
O'Barr <i>vs.</i> Trammell	37th	" 600
Owensley & Co. <i>vs.</i> Woolhopter	14th	" 318
Parks <i>vs.</i> Bailey	22d	" 654
Park <i>et al.</i> , ex'rs, <i>vs.</i> Hardy <i>et al.</i> , guardians	19th	" 577
Parish <i>vs.</i> Murphey <i>et al.</i>	51st	" 40
Parsons <i>et al.</i> <i>vs.</i> Trustees of Atlanta University	44th	" 610
Patten <i>vs.</i> Boggs	43d	" 38
Perdue <i>vs.</i> Ellis	18th	" 615
Prescott <i>vs.</i> Bennett	50th	" 353
Prescott <i>vs.</i> Bennett	50th	" 358
Reaves <i>vs.</i> Burts, adm'r	39th	" 391
Reid <i>et ux.</i> , <i>vs.</i> Moore, executor	12th	" 560
Robinson <i>vs.</i> Lane	19th	" 313
Robinson <i>vs.</i> Lane	19th	" 581
Rowland <i>vs.</i> Cameron	35th	" 15
Salter <i>vs.</i> Williams	10th	" 547
Selma R. and D. R. R. Co. <i>vs.</i> Redwine	51st	" 123
Selma R. and D. R. R. Co. <i>vs.</i> Tyson	48th	" 364
Shields <i>vs.</i> Yonge	15th	" 685
Shorter <i>et al.</i> <i>vs.</i> Smith <i>et al.</i>	9th	" 639
Shute <i>vs.</i> The State	36th	" 238
Solomon <i>vs.</i> Day	40th	" 22
Smith <i>et al.</i> <i>vs.</i> Atwood	14th	" 682
Southern Ex. Co. <i>vs.</i> Shea	38th	" 130
Southwestern R. R. Co. <i>vs.</i> Felder	46th	" 599
Southwestern R. R. Co. <i>vs.</i> So. and At. Tel. Co	46th	" 123
Springle <i>et al.</i> <i>vs.</i> Congleton	30th	" 663
Sweetwater Manufacturing Co. <i>vs.</i> Glover	29th	" 400
Thornton <i>vs.</i> Burch	20th	" 612
Thompkins <i>vs.</i> Williams	19th	" 22
Thompkins <i>vs.</i> Tigner	17th	" 398
Tyndall <i>vs.</i> Harkinson	19th	" 601
Tyson <i>vs.</i> McAfee	50th	" 353
Tyson <i>vs.</i> McAfee	50th	" 358
Veal <i>vs.</i> Veal	45th	" 11
Young & Calhoun <i>vs.</i> Harrisons	6th	" 629
Wallace <i>et al.</i> <i>vs.</i> Holly	13th	" 562
Wallace <i>vs.</i> Cannon	38th	" 335
Wallace <i>vs.</i> Matthews	39th	" 407
Walton <i>vs.</i> Bethune	37th	" 363
Ware <i>vs.</i> Jackson	19th	" 22
Weaver <i>vs.</i> Ogletree <i>et al.</i> , ex'rs	39th	" 318
Whitney <i>vs.</i> The State	38th	" 573
Whitten <i>vs.</i> Mayor, etc., of Covington	43d	" 615
Wiley, Parish & Co. <i>vs.</i> Smith <i>et al.</i> , trustees	3d	" 577
Willett <i>vs.</i> Price	32d	" 29
Williams <i>vs.</i> McIntyre, adm'r	8th	" 577
Wilson <i>vs.</i> Ansley	47th	" 457
Wingard & Ham <i>vs.</i> The State	13th	" 450
Wingfield <i>vs.</i> Virgin <i>et al.</i>	51st	" 227
Wooten <i>vs.</i> Archer	49th	" 40
Wright, adm'r, <i>vs.</i> Hicks, adm'r	12th	" 577

CERTIORARI. See *Appeal*.

CHARGE OF COURT.

1. Defendant being entitled to a certain charge, ~~it was~~ error in the court to say in the presence of the jury that it was inapplicable to the case. *Atlanta and Richmond Air Line R. R. Co. vs. Ayers*, 12.
2. Error to remark that certain evidence was of little value, and to give reasons therefor. *Wannack vs. Mayor, &c., of Macon*, 162; *Southern Life Insurance Co. et al. vs. Wilkinson et al.*, 535.
3. Law must be charged substantially as it exists on the facts which appear; but not error to fail to give particular principle, if evidence does not fully present case to make it applicable. *Murray vs. Sells, for use*, 257.
4. Request to charge should be qualified so as to be applicable to testimony. *Baker vs. Lyman, ex'x*, 339; *Franklin, Reid & Co. vs. Newsum et al.*, 580.
5. Requests covered by general charge sufficient. *Ratteree vs. State*, 570.
6. General exception to entire charge insufficient. *Harris et al. vs. Harris et al.*, 678.
7. Refusal to charge request which includes unauthorized hypothesis of facts, not error. *Ibid.*

CLAIMS.

1. Factor's lien levied and claim filed, *fiat* of judge and *fi. fa.* amended by striking out amount for which there was no valid lien, proper to dismiss levy as to such property as was claimed. *Hutchinson & Bro. vs. Jackson*, 56.
2. Order of dismissal granted, not error to refuse to require securities on claimant's bond to hold property until final judgment of the court or until *supersedeas*. *Ibid.*
3. Sayings of defendant in *fi. fa.*, or other person, while in possession of land, admissible in favor of plaintiff, to show such person not to have been the tenant of claimant. *Ozmore vs. Hood & Kiddoo*, 114.
4. Execution against two, levy on land "on which defendant's family now lives," dismissed as too uncertain. *Anderson vs. Lee, ex'r*, 189.
5. Mortgage not foreclosed in county where land lies, claimant may make objection. *Hockenfull vs. Westbrook*, 285.
6. *Fi. fa.* rejected, claim should be dismissed; error to allow verdict. *Ibid.*
7. Where levy on several city lots recites that one, without designating which, was in possession of defendant, *onus* not thereby cast on claimant; plaintiff still entitled to open and conclude. *Baker vs. Lyman, ex'x*, 339.
8. Voluntary conveyance to claimant attacked by plaintiff in *fi. fa.*, issue is, was deed made to hinder and delay creditors, and was claimant aware of such intention? *Ibid.*
9. Verdict for claimant not illegal because he only showed title to one undivided half of land levied on, where *prima facie* case was only made out against that half. *Mitchell, trustee, vs. King*, 470.
10. Levy dismissed by order of court, though on illegal ground, yet plaintiff cannot proceed to trial of claim under same levy. *Patterson vs. Bagley*, 483.
11. Title retained to secure purchase money; attorneys to collect, in ignorance of fact, take mortgage; title may still be relied on. *Jones vs. Albin Sons & Co.*, 585.

CLERK OF SUPERIOR COURT. See *Costs* 1, 2.

COMMON CARRIERS.

1. Evidence disclosed receipt of goods at Savannah to be carried to Atlanta, and failure to transport; error to non-suit. *Cohen & Menko vs. So. Ex. Co.* 128.
2. Goods in depot allowed to remain, by consent of agent, from Saturday until Monday without additional charge, liability of railroad as warehouseman continued. *West. & At. R. R. Co. vs. Camp*, 596.

CONSTITUTIONAL LAW.

1. Assessment of damages to owners of property taken for public use, with right of appeal to superior court, constitutional. *Mayor etc., of At. vs. Cen. R. R. & B'g Co.*, 120.
2. Advantage to owner from taking cannot be set-off against actual value, but may be considered in estimating claim for other damages. *Ibid.*
3. A municipal corporation will be enjoined from appropriating property of state for street purposes. *Ibid.*
4. Damage to land taken for railroad purposes, upon trial of issue as to, proof of value to railroad inadmissible. *Selma, R. & D. R. R. Co. vs. Keith*, 178.
5. Evidence of railroads having backed water upon plaintiff's land inadmissible. *Ibid.*
6. That witness, who was one of a company, was willing to give \$6,000 00 for land for their business, but other members would only give \$5,500 00, was inadmissible. *Ibid.*
7. That witness, by reference to a book, and taking into consideration the fall that could be obtained, concluded that a twenty-horse power could be procured, the book not being in court, was inadmissible. *Ibid.*
8. Actual value of land appropriated by railroad at time of taking may be shown by opinion of witnesses acquainted therewith; also actual cash value of mill shoal, and extent it was diminished by location. *Ibid.*
9. Misdemeanors, concurrent jurisdiction over, may be conferred on other courts than superior, but cannot be denied to latter. *Porter vs. State*, 236; *Clifton vs. State*, 241.
10. Par. 2, sec. 17, article 5, of constitution of 1868, casting burden of proof on plaintiff in certain cases, not violative of the constitution of the United States. *Edwards vs. Dixon, admr, et al.*, 334.
11. Tax on carrier graduated according to number of drays, etc., employed, not unconstitutional. *Goodwin et al. vs. Mayor, etc., of Savannah*, 410.
12. Indictment in superior court and arrest thereunder, subsequent conviction in city court valid plea in bar thereto. *Maher vs. State*, 448.
13. Carrying arms in presence of courts, law making penal, not unconstitutional. *Hill vs. State*, 472.
14. Paragraph 2 of section 7 of 5th article of constitution inapplicable to suits by *bona fide* holders of bank bills; and if applicable, is contrary to provision of United States constitution forbidding the impairing the obligation of contracts. *Branch vs. Baker*; *Dobbins vs. Sibley*, 502.
15. Taxation is a question of power, the exercise of which is vested in the legislative department of government. When that department has exercised its judgment, the courts have no power to interfere unless the fundamental law has been violated. *Linton vs. Mayor, etc., of Athens*, 588.
16. Law authorizing municipal corporation to prohibit sale by retail of fresh meats and vegetables, during market hours, at any other place

than market-house, constitutional. *Badkins vs. Robinson, marshal*, 613.

CONSTRUCTION OF STATUTES. See *Laws*.

CONTEMPT. See *Equity*, 9-13.

CONTINUANCE.

1. Counter-showing, and evidence conflicting, discretion of court not interfered with unless abused. *Bowling, adm'r, vs. Whalley*, 24.
2. Discretion of court as to, not interfered with unless abused. *Chaney vs. Carrigan*, 84; *Bird vs. State*, 602.
3. Motion based on recent finding of indictment and constant engagement of defendant's counsel with other business, properly overruled, it appearing that defendant had been arrested at previous term and was then fully informed of the nature of the accusation. *Shivers vs. State*, 149.
4. Eight days notice of petition to attach administrator for violating restraining order in collecting assets, facts being peculiarly within his knowledge, sufficient. *Williams, adm'r, vs. Lampkin & Co. et al.*, 200.
5. Continuance to have amended plea sworn to properly refused where defendant resided out of county. Affidavit of attorney sufficient. *Fort vs. West et al., adm'rs*, 584.

CONTRACTS.

1. After the maturity of note, maker wrote across its face, "I agree to pay ten per cent. on this bill till paid;" this did not fix a new day of payment. Nor was it competent to show the agreement upon such new day by parol, unless it was omitted from the writing by accident, fraud, or mistake. *Alston vs. Wingfield, adm'r*, 18.
2. Vendee not to have possession till note for \$1,000 00 was paid; two days before it became due, in consideration of payment of \$400 00 then made, vendor agreed to give possession and ample time to pay balance. A delay of fifteen months before suit was "ample time." *Cook vs. Crocker*, 66.
3. Contract by the year at stipulated sum per month; discharge before expiration of term; recovery for amount due to time of discharge, not estop suit for balance due for remaining portion of year. *Sterne vs. Holitzer*, 82.
4. Part performance which takes parol contract out of statute of frauds. *Barnett L. of S. vs. Blackmar & Chandler*, 98; *Saulsbury, Respass & Co. vs. Blandy*, 665.
5. Promise to pay debt of another binding where there has been performance on part of creditor and acceptance by promissor. *Goolsby vs. Bush*, 353.
6. Insurance companies, by common agent and name, issued policy which stipulated that each was to be liable for one-fourth of loss. An action maintainable against them jointly and verdict may be moulded to conform to contract. *Sutherland vs. Underwriters' Agency*, 442.
7. Contract to ditch for another at stipulated price per rod, to be paid on completion of work, action therefor not prematurely brought because portion of work not well done. *Reid & Daniel vs. Gallaher*, 456.
8. Note for purchase money transferred, but renewed in hands of holder by new note with security; not such novation as relieves homestead from liability for same. *Wofford vs. Gaines*, 485.

9. Agent of Georgia railroad in Greene county pays up amount claimed to be due in Richmond county, his right to recover overpayment arises upon implied contract, which is neither made nor to be performed in Greene. *Georgia R. R. and B'g Co. vs. Seymour, adm'r*, 499.
10. Conditional sale made to secure purchase money; attorneys to collect, in ignorance of fact, take mortgage; client not lose rights under sale. *Jones vs. Albin Sons & Co.*, 585.
11. *Ultra vires*, contract of hose company with steamboat company to furnish boat for excursion of joint pleasure and profit, is. *Screven Hose Co. vs. Philpot et al.*, 625.
12. Minor hired out by parent for one year; employer should only discharge on notice to parent. *Day vs. Oglesby*, 646.
13. If discharged without such notice, parent may recover for time labor was performed. *Ibid.*
14. Accept draft, contract to, bill to enforce not sustained, which sets up failure to accept totally different paper, though alleged to be that contemplated by the parties. *Saulsbury, Respass & Co. et al. vs. Blandy*, 665.

CORPORATIONS.

1. Pending suit by corporation, name was changed by act of legislature, if corporators should consent, but judgment was entered in the old name; it is too late for defendant to set up that there was no such corporation, especially if he fails to make it appear that the corporators accepted the new name. *Water Lot Co. vs. Bank of Brunswick*, 30.
2. Garnishment directed to A, agent of corporation, not bind debt due by principal to defendant, unless such agent has fund in land. *Daniels vs. Meinhard Bros & Co. et al.*, 359.
3. Whilst it is competent for officers to state that company had no notice of certain fact, it may be shown by cross-examination that statement was mere conclusion. *Southwestern R. R. Co. vs. At. & G. R. R. Co.*, 401.
4. Recovery in suit by bill-holder against stockholder of bank ascertained by amount of bills outstanding at time of suit. The latter is liable for such proportion of circulation as his stock bears to capital stock, less bills taken up before suit. *Branch vs. Baker; Dobbins vs. Sibley*, 502.
5. Foreign guardian, if authorized by law of state of appointment, may sell and transfer stock in railroad company in this state without application to courts here. *Ross, adm'r, et al., vs. Southwestern R. R. Co. et al.*, 514.
6. Title of purchaser of stock complete when seller has given on script authority to proper officer to transfer, and the price has been paid. *Ibid.*
7. *Ultra vires*, contract of hose company with steamboat company to furnish boat for excursion of joint pleasure and profit, is. *Screven Hose Co. vs. Philpot et al.*, 625.
8. Assets placed in hands of officer, corporation is necessary party to bill filed by stockholder against such officer for account. *Young vs. Moses*, 628.
9. Though corporation has no place of business, and no one in office to serve, yet remedy is provided in section 3370, Code. *Ibid.*

See *Municipal Corporations*.

COSTS.

1. Clerk of superior court only entitled to \$6 00 for each case prosecuted to judgment, including record of proceedings. *MacMurphy, clerk, vs. Dobbins*, 294.

2. Extra compensation to clerks, sheriffs, laws authorizing repealed by act of March 2d, 1874. *In re Bradford, clerk, et al.*, 392.
3. Service performed for county which creates a debt, person has same remedy as other creditors. *Ibid.*
4. Equity cause, in discretion of chancellor, who shall pay costs. *Goodwyn et al. vs. Mayor and C. of Savannah*, 410.
5. Act of 1811, authorizing magistrate to make prosecutor in certain cases pay costs, still of force. *Gault et al. vs. Wallis*, 675.
6. Superior court, upon *certiorari*, may direct magistrate to refund costs. This may be compelled as part of his official duty. *Ibid.*

COUNTY AND COUNTY MATTERS. See *Costs*, 3.

COURTS.

1. Proceedings of court can only be shown by its records; if the minutes fail to disclose that a jury was sworn and impaneled, a verdict and judgment entered during that term are *prima facie* void. *Rutherford vs. Crawford*, 138.
2. Whether such defect can be cured by an entry *nunc pro tunc* as against purchaser from defendant. *Quare?* *Ibid.*
3. That the defendant married the sister-in-law of the judge's wife, does not disqualify him from presiding. *Fort vs. West et al., adm'rs*, 584.
4. Judicial officer not liable for error of judgment unless result of malice or corruption. *Gault et al. vs. Wallis*, 675.

COVENANT. See *Land*, 5, 6.

CRIMINAL LAW.

1. Burning hole in guard-house by prisoner merely to effect escape, and not with intent to consume or generally injure the building, not constitute offense of attempt to burn house. *Jenkins vs. State*, 33.
2. Indictment for assault with intent to rape need not use the term "female," if the sex of the person assaulted appears by other words used therein. *Joice vs State*, 50.
3. The evidence must show that it was the intent of the defendant at the time, forcibly and against the will of the female, to have carnal knowledge of her person. *Ibid.*
4. Plea that witnesses on whose testimony indictment was found, were neither sworn in open court nor on proper oath, without stating names of witnesses nor oath taken, not good. *Reich vs. State*, 73.
5. That one of grand jurors who found indictment was an alien, good plea. *Ibid.*
6. City council of Columbus has no jurisdiction to try for offense of keeping open tippling-house on Sabbath day. *Ibid.*
7. "No bill" returned by two successive grand juries, not entitle defendant to order discharging him from offense. *Christmas vs. State*, 81.
8. Verdict of guilty of whipping wife on indictment for assault with intent to murder, judgment arrested. *Manigault vs. State*, 113.
9. Attempt, jury may find guilty of under indictment for main offense. *Hill vs. State*, 125.
10. Attempt to commit certain offenses for which no penalty is prescribed. *Ibid.*
11. Consent that should jury agree that night they might return sealed verdict, not extend to verdict found on next day. *Nolan vs. State*, 137.

12. Defendant has legal right to be present when verdict is rendered. *Ibid.*
13. Defendant's presence when verdict was rendered need not be entered of record. Absence of such entry is therefore not good in arrest. *Ibid.*
14. Transcripts from books of comptroller general and treasurer, certified under section 3816 of Code, admissible to show failure of collector to pay over taxes. *Shivers vs. State, 149.*
15. Motion for continuance based on recent finding of bill and constant engagement of defendant's counsel with other business, properly overruled, it appearing that defendant had been arrested at previous term, and was then fully informed of the nature of the accusation. *Ibid.*
16. Entry by solicitor general of receipt of \$5 00 as his cost on original *scire facias*, no discharge of bond. *Williams vs. Jenkins, gov., 166.*
17. Conviction founded on circumstantial testimony, court below directed to exercise discretion. *Jackson vs. State, 195.*
18. Indictment for assault with intent to murder, conviction may be for an assault, but not for an attempt to make an assault. *Wilson vs. State, 205.*
19. Honest mistake, after due caution, as to age of youth playing at billiards, acquits of offense of allowing minor to play without consent of parents, etc. *Stern vs. State, 229.*
20. Inquiry of parent or guardian not an absolute requirement. *Ibid.*
21. Misdemeanors, concurrent jurisdiction over may be conferred on other courts than superior, but cannot be denied to the latter. *Porter vs. State, 236; Clifton vs. State, 241.*
22. Lewd house, to sustain indictment for keeping, only necessary to show that defendant contributed to and aided, directly or indirectly. *Clifton vs. State, 241.*
23. Juror failing to answer when called, after jury was stricken, but before sworn, not error to order panel to be filled and a restrike. *Ibid.*
24. Charge that defendant maintained and kept a lewd house is sufficient, without alleging that it was a place for fornication, etc. *Ibid.*
25. Larceny from house, taking goods from in front of warehouse, not constitute. *Middleton vs. State, 248.*
26. Entire charge not in record, failure to charge request in burglary case that possession of goods taken not conclusive proof of guilt, not error. *Spears vs. State 252.*
27. Malicious mischief in burning stack of fodder; evidence that tracks leading from stack resembled those of defendant, not sufficient to convict. *McDaniel vs. State, 253.*
28. Murder, doubtful if case of was made out, new trial granted. *Cooper vs. State, 256.*
29. Charge that defendant was entrusted with melons to be applied to use and benefit of owner, not sustained by proof that they were delivered to defendant for sale, proceeds, less charges, to be paid to owner. *Carter vs. State 326.*
30. Offenses not punishable by fine and imprisonment or more severe penalty, may be settled before indictment. *Goolsby vs. Bush, 353.*
31. Obscene language to female, on trial for using, before defendant is entitled to a charge that the words must be an insult to person addressed, he must first show such provocation for using them as would amount to justification. *Pierce vs. State, 365.*
32. Drunkenness of defendant shortly before use of language charged, admissible, provided the intoxication probably continued. *Ibid.*

33. Failure to work streets, mayor, etc., of Dalton may assess fine for and enforce payment by imprisonment. *Cobb vs. Mayor etc., of Dalton*, 426.
33. Murder, provocation by words, etc., accompanied by drawing of knife, but with no attempt to use it, not reduce to manslaughter. *Edwards vs. State*, 428.
34. "Equivalent circumstances" not restricted to a correspondence in their character with an actual assault or an attempt to commit a serious personal injury. *Ibid.*
35. That names of one or more of jurors who tried the case were not on lists, no ground for new trial. *Ibid.*
36. Jurors are judges of the law so far as to apply the instructions to them to the facts. *Ibid.*
37. Indictment in superior court, and arrest thereunder, subsequent conviction in city court valid plea in bar thereto. *Maher vs. State*, 448.
38. Indictment for carrying weapon to court of justice, sufficiently certain which charges that it was "to and at a court of justice, then in session, in and for 426th district, G. M." *Hill vs. State*, 472.
39. Carrying weapons to courts of justice, law making penal, constitutional. *Ibid.*
40. Death of defendant after argument in superior court, but before judgment; no decision will be pronounced. *Herrington vs. State*, 552.
41. Burglary in night, incumbent on state to show offense committed at night. *Waters vs. State*, 567.
42. Doubtful whether offense was committed in night time, defendant should have benefit. *Ibid.*
43. Juror's real name "Barry," but on the lists "Berry," by which last he was generally called, not error to put on defendant. *Ratteree vs. State*, 570.
44. Dying declarations of opinions inadmissible. *Ibid.*
45. *Res gesta*, declarations after transaction has wholly terminated inadmissible. *Ibid.*
46. Marrying wife of another, marriage and knowledge by defendant that woman was another's wife must be clearly shown. *Arnold vs. State*, 574.
47. Plea that grand jury who, at previous term, found indictment, were not sworn, may be determined by court by inspection of minutes. *Bird vs. State*, 602.
48. Plea of not guilty and conviction thereon waives objections to verdict and rulings on previous trial of issue on special plea. *Ibid.*
49. Plea that a previous valid indictment for same offense had been *not pressed* by order of court, without consent of defendant, properly stricken. *Ibid.*
50. That some one cried "kill him" inadmissible upon trial of several for assault with intent to murder, there being a crowd present at the time. *Harris et al. vs. State*, 640.
51. Equity cannot interfere with administration of criminal law. *Gault et al. vs. Wallis*, 675.

DAMAGES.

1. In a suit against a railroad company for damages, both parties being negligent, recovery should be lessened in proportion to negligence of plaintiff. *Atlanta and Richmond Air Line R. R. Co. vs. Ayres*, 12.
2. Rule established in Macon and Western Railroad Company *vs. Johnson*, 38th Georgia, 408, for estimating damages to widow for homicide

of husband, affirmed. Amount should be decreased in proportion to contributory negligence of husband. *Ibid.*

3. Land taken for railroad purposes, damage is actual value thereof at time of taking. If mill shoal is injured by appropriation, actual cash value thereof may be shown, and extent to which it was diminished by location. *Selma, Rome and Dalton R. R. Co. vs. Keith*, 178.
4. Cotton stored in certain house sold; purchaser takes other not sold; damage on action therefor is value of cotton at time of taking, with interest. *Newton Manufacturing Company vs. Whites*, 395.

DEBTOR AND CREDITOR.

1. Creditor, to avail himself of failure to record voluntary settlement in time, must have become such before record of settlement, and on faith of property embraced therein. *Brown vs. Spivey, trustee*, 155.
2. Voluntary conveyance by solvent husband, valid against creditors. *Ibid.*
3. Conveyance to relative of all property in state by debtor; no reply to creditor that he has sufficient in distant state. *Baker vs. Lyman, ex'x*, 339.
4. Conditional sale made to secure purchase money; attorneys to collect, in ignorance of fact, take mortgage; clients not lose rights under sale. *Jones vs. Albin Sons & Co.*, 585.

DECREE. See *Equity*, 31, 32.

DEDICATION. See *Municipal Corporations*, 9.

DEEDS.

1. If attesting witness be a magistrate, presumption is that he saw instrument legally executed. *Highfield et al. vs. Phelps et al.*, 59.
2. Where deed was made to state, for right of way of its railroad, of such land as may be designated by chief engineer, grantor and privies are bound by his location. *Dougherty vs. West & At. R. R. Co.*, 304.
3. This is true whether the fee or an easement only passed. *Ibid.*
4. Recital in sheriff's deed that unsigned levy on land was made by sheriff, not cure defect in *fi. fa.* *Jones, Jr., vs. Easley et al.*, 454.
5. Claimant under deed cannot deny its terms. *Thrower vs. Wood*, 458.
6. Copy from record, to introduce it must be shown that all reasonable means to obtain original, including notice to opposite party to produce, have failed. *Hadley vs. Bean et al.*, 685.
7. Where lot was by deed made permanently chargeable with proportionate part of expense, such charge constituted a covenant running with the land and attached to it wherever title might be. *Howard Man. Co. et al. vs. Water Lot Co.*, 689.
8. Distinction between personal covenants and covenants running with land. *Ibid.*

DISTRIBUTION. See *Wills*, 4, 6-8, 12.

DIVORCE. See *Husband and Wife*, 15, 16.

DORMANT JUDGMENT. See *Judgments*, 3-6, 24, 25.

DOWER. See *Vendor and Purchaser*, 4.

EASEMENT. See *Land*, 1-3.

EJECTMENT.

1. Judgment upon warrant sued out by plaintiffs prior to ejectment, against defendant as a tenant at sufferance, where a counter-affidavit denying such tenancy was filed, is conclusive of fact that defendant did not hold as their tenant. *Tomlinson et al. vs. Driver, 9.*
2. Vendor taking notes for purchase money and giving bond for titles, may bring ejectment upon failure of vendee to pay any one of notes; nor does his receipt of portion of purchase money, after all the notes are due, affect this right. *Alston vs. Wingfield, adm'r, 18.*
3. Bankruptcy of defendant after verdict against him, no ground of staying proceedings in the supreme court on writ of error at his instance. *Ibid.*
4. Verdict against tenant where landlord knows of suit, though not a formal party, both may be ejected under writ of possession. *Rogers vs. Bell et al., 94.*
5. Not sufficient for landlord to show, in suit for damages, that appeal from verdict was withdrawn without his knowledge; he must show that plaintiff in ejectment knew defendant only to be a tenant, and that he (landlord) was defending suit through him. *Ibid.*
6. Defendant held under sale made by virtue of order of the chancellor which plaintiffs claimed to be illegal. Even if true, yet, if the indebtedness to defendant, which was the consideration of the purchase, was contracted for the benefit of the plaintiffs and of the property in controversy, they cannot recover. This defense may be made by equitable plea. *Askew, ex'r, vs. Patterson et al., 209.*
7. Complaint for land, statutory form amendable by setting up and praying correction of mistake in deed to plaintiff. *Murray vs. Sells, for use, 257.*
8. Prior possession alone, recovery had on against trespasser. *Jones, Jr., vs. Easley et al., 454; Hadley vs. Bean et al., 685.*
9. Newly discovered evidence that administration had been granted on estate of person of same name as plaintiff's lessor, and that such lessor actually resided in the county of the administration, sufficient evidence of death to authorize new trial. *Clarke vs. Pearson et al., 496.*

ELECTION OF CHILD'S PART. See *Administrators and Executors, 11.*

EMINENT DOMAIN. See *Constitutional Law, 1-8.*

EQUITY.

1. Concurrent jurisdiction given to courts of law, not deprive equity of jurisdiction it originally had. *Hardeman & Sparks vs. Battersby, 36.*
2. Where courts have concurrent jurisdiction, that first obtaining will retain. *Ibid.*
3. Where a warehousemen's receipt for cotton was lost or destroyed, equity has jurisdiction of bill for recovery of cotton, containing offer of indemnity to warehouseman from subsequent liability on receipt. *Ibid.*
4. Especially should demurrer to such bill be overruled, where, if sustained, complainant would be barred by the statute of limitations. *Ibid.*
5. Assignee of execution against firm not compelled to proceed against property of any particular partner on account of equities existing between members of firm. *Gammell vs. Mulford et al., 78.*
6. Demurrer cannot be filed at trial term. *Mayor, etc., of Atlanta vs. Central Railroad and Banking Company, 120.*

7. A municipal corporation will be enjoined from appropriating property of state for street purposes. *Ibid.*
8. Injunction, discretion as to granting or refusing not controlled where evidence is conflicting. *Goldsmith vs. Elsas, May & Co., 186.*
9. Administrator enjoined from collecting assets of estate; petition for attachment for violating injunction should specify assets collected. *Williams, adm'r, vs. Lampkin & Co., et al., 200.*
10. Eight days notice of such proceeding sufficient. *Ibid.*
11. Restraining order has all the force of an injunction. *Ibid.*
12. Chancellors allowed large discretion in enforcing obedience to orders. *Ibid.*
13. Orders may be rescinded or modified at any time on sufficient cause shown. *Ibid.*
14. Fraud alleged, discretion of chancellor refusing to dissolve not controlled. *Hunt, ex'r, et al. vs. Perry, 206.*
15. Defendant held under sale made by virtue of order of the chancellor which plaintiffs claim to be illegal. Even if true, yet, if the indebtedness to defendant, which was the consideration of the purchase, was contracted for the benefit of plaintiffs and of the property in controversy, they cannot recover. *Askew, ex'r, vs. Patterson et al., 209.*
16. Where trust deed was executed prior to Code, but life tenant did not die till after, leaving remaindermen minors, the chancellor had authority, at chambers, to appoint a trustee for the minors and to order sale of property. *Ibid.*
17. Charge that purchasers at judicial sale combined with sheriff to deter persons from bidding, prevents dismissal of bill by chancellor however satisfied he may be of its want of truth. *Van Dyke vs. Martin et al., 221.*
18. Suit against trustee, who was life tenant, on individual debt, seeking to charge estate, and judgment by default; sale of trust property under *fi. fa.* enjoined for protection of remaindermen. *Keaton, trustee, vs. Baggs & Stephens, et al., 226.*
19. Interest of usee for life may be subjected to the claim. *Ibid.*
20. Proceeds of homestead invested in other property, but by mistake title taken to wife as free trader, purchaser thereof, with notice, will, in equity, hold to same use as was the homestead. *Murray vs. Sells, for use, 257.*
21. Ejectment in statutory form amendable by setting up mistake in deed to plaintiff and praying correction. *Ibid.*
22. Mutual mistake, as a general rule, only relievable in equity; but in determining whether the mistake was mutual the real parties at interest are looked to and not the nominal parties to record. *Ibid.*
23. Jurisdiction to set aside will admitted to probate, equity has not. *Tudor et al. vs. James, adm'r, 302.*
24. Proper parties not before chancellor, and affidavits conflicting, injunction properly refused. *Glass et al. vs. Clark, 380.*
25. Judgment will not be enjoined in equity because it does not follow declaration and verdict. Remedy is by illegality. *Leneard et al. vs. Collier, 387.*
26. Enjoin tax, complainants seeking to, show themselves without ordinance, remedy is by illegality. *Goodwin et al. vs. Mayor, etc., of Savannah 410.*
27. Objectionable section of tax ordinance repealed before hearing of motion, injunction properly refused. *Ibid.*

28. Costs in equity, in discretion of chancellor who shall pay. *Ibid.*
29. Receiver and injunction prayed; consent that receiver should be appointed on condition that there should be no injunction; other creditors subsequently made parties, though alleging new grounds for injunction, are bound by agreement. *Flannegan, Abell & Co. et al. vs. Hardeman & Sparks et al.*, 440.
30. Writ of error to refusal of injunction must be set before heel of docket is reached, or will be dismissed. *McIntyre vs. Hurst et al.*, 499.
31. Bill filed by executor affecting rights of non-resident minor legatees, whose guardian, appointed by proper court of their residence, appears; decree thereon without appointment of guardian *ad litem*, irregular but not void. Rights acquired thereunder protected. *Ross, adm'r, et al. vs. Southwestern R. R. Co. et al.*, 514.
32. Complainants in bill to review irregular decree which directed that certain assets should be turned over to foreign guardian, having obtained a decree against said guardian and his securities, for waste of a portion of such assets, are estopped from denying validity of guardianship. *Ibid.*
33. Multifarious, this bill is not. *Greer, adm'r, vs. Courson et al.*, 532.
34. Dissolve injunction, refusal of motion to, not subject to review in summary manner, even at instance of defendants not parties when granted. Applicable, also, to motion to vacate receivership. *Balkin & Co. et al. vs. Ferst & Co. et al.*, 551.
35. Will charges stock with support and education of minors. If such be not furnished them, they have prior claim on stock for what same would have cost. *Whitehead, adm'r, et al., vs. Park et al.*, 575.
36. Q. buys from C., paying part of purchase money and taking bond for titles. He sells part of land to L., who pays price. F. R. & Co., for Q., advance to C. balance of purchase money, who thereupon conveys to Q., the latter immediately conveying to F. R. & Co., to secure them: *Held*, that F. R. & Co. stand in the place occupied by C as to purchase money advanced. They are entitled to decree for sale of land not sold by Q., and if that be insufficient, then for sale of balance. *Franklin, Reid & Co. vs. Newsom et al.*, 580.
37. Specific performance is in discretion of court, yet that power must be exercised by jury under evidence and charge. *Ibid.*
38. Judgment sought to be enjoined on account of failure to make defense by mistake, oversight, etc., due diligence must be shown and facts averred how such omission occurred. *Simmons vs. Martin, adm'r*, 620.
39. Set-off and recoupment, legal remedies complete, equity not aid. *Collins vs. Clayton, trustee*, 649.
40. Vendor not enjoined from collecting purchase money because there are judgments against him which cannot affect property sold to injury of vendee. *Ibid.*
41. Actions not enjoined because aggregate defense would exceed jurisdiction of court, where that set up to each suit is within. *Ibid.*
42. Accept draft, contract to, bill to enforce not sustained which sets up failure to accept totally different paper, though alleged to be that contemplated by the parties. *Saulsbury, Respass & Co. et al. vs. Blandy*, 665.
43. Criminal law, equity cannot interfere with administration of. *Gault et al. vs. Wallis*, 675.
44. Written contract relied on by complainant must be set out in bill or attached thereto as exhibit. *Howard Man. Co. et al. vs. Water Lot Co.*, 689.

ESTOPPEL.

1. Contract by year at stipulated sum per month ; discharge before expiration of term ; recovery for amount due to time of discharge not estop suits for balance due for remaining portion of year. *Sterne vs. Hohitzer*, 82.
2. Estoppel as to one person not necessarily as to another not privy in estate with first. *Murray vs. Sells, for use*, 257.
3. Although words of deed or will do not create separate estate, yet if husband accepts appointment of trustee and acts thereunder, wife may maintain bill against his legal representative for the property. *Moun-ger vs. Duke, adm'r*, 277.
4. Mortgage by wife which recites that debt was contracted by husband for her benefit, not estop her from showing to contrary. *Dunbar & Co. vs. Mise*, 435.
5. Claimant under deed is estopped from denying its terms. *Thrower vs. Wood*, 458.
6. Complainants in bill to review irregular decree which directed that certain assets should be turned over to foreign guardian, having obtained a decree against such guardian and his securities for waste of a portion of the assets, are estopped from denying validity of guardianship. *Ross, adm'r, et al. vs. Southwestern R. R. Co. et al.*, 514.
7. Award upon bill to which sheriff was a formal party, not estop him from traversing recitals charging him with money. *Colbert, sh'ff, vs. Parish & Co. et al.*, 554.
8. Sale of land held under bond for titles, no deed having been filed, obligee's mere presence at sale, being ignorant of this fact, not estop. *Upchurch vs. Lewis et al.*, 621.

EVIDENCE.

1. Not competent to show by parol a different day of payment from that stated in note, unless omitted by accident, fraud or mistake. *Alston vs. Wingfield, adm'r*, 18.
2. Sayings of persons in possession admissible to show adverse holding. *Ozmore vs. Hood & Kiddoo*, 114.
3. Proceedings of court can only be shown by records, unless they be lost or destroyed. *Rutherford vs. Crawford*, 138.
4. Transcripts from books of comptroller general and treasurer, certified under section 3816 of Code, admissible on trial for embezzlement, to show failure of collector to pay over taxes. *Shivers vs. State*, 149.
5. Damages to plaintiff for land taken for railroad purposes, upon trial of issue as to, proof of value to railroad inadmissible. *Selma R. and D. R. R. Co. vs. Keith*, 178.
6. Evidence of railroads having backed water upon plaintiff's land inadmissible. *Ibid.*
7. That witness, who was one of a company, was willing to give \$6,000 00 for land for their business, but other members would only give \$5,500 00, was inadmissible. *Ibid.*
8. That witness, by reference to a book and taking into consideration the fall that could be obtained, concluded that a twenty horse power could be procured, the book not being in court, was inadmissible. *Ibid.*
9. Actual value of land appropriated by railroad at time of taking may be shown by opinion of witnesses acquainted therewith. Also, actual cash value of mill shoal, and extent it was diminished by location. *Ibid.*

10. The order of an ordinary levying a tax is the best evidence of his intention as to the amount thereof, his conversation to the contrary thereof, notwithstanding. *Gilbert et al. vs. County of Dougherty*, 191.
11. Parol, competent to show consideration of note by, where none is expressed. *Boynton vs. Twitty et al. admr's*, 214.
12. Letter from book-keeper of manufacturing company to defendant, without proof of authority, inadmissible to show goods not sold but sent on consignment. *Wilcoxon Man. Co. vs. Bohanan & Morgan*, 219.
13. Judicial cognizance of what had previously transpired before them, courts not bound to take. *Clifton vs. State*, 241.
14. Admissions of executor only competent as to own acts after he became clothed with trust. *Godbee, adm'r, vs. Sapp*, 283.
15. Receipt may be contradicted or explained by parol. *Walters vs. Odom*, 286; *Bell vs. Boyd & Brumby*, 643.
16. Evidence unauthorized by pleadings, admitted without objection, may be considered by jury. *Artope, trust., et al., vs. Goodall ex'r*, 318.
17. Illustrate issue, all evidence tending to, admissible. *Baker vs. Lyman, ex'r.*, 339.
18. Action for cotton taken from certain house; record of judgment for plaintiff for cotton taken at different time and place irrelevant. If not clear that cotton sued for was not covered by judgment, it should be admitted and question of former recovery left to jury. *Newton Man. Co. vs. Whites*, 395.
19. Agent, sayings of, only admissible against principal when made *dum ferret opus*. *Ibid.*
20. Admissions of widow admissible on question as to misrepresentation in application for policy, in suit thereon for benefit of herself and child. *Southern L. Ins. Co. vs. Wilkinson et al.*, 535.
21. Bible, though not recognized as the family bible, yet shown always to have been in possession of a member of family, admissible on question of age. *Ibid.*
22. Docket kept by sheriff, showing similar entry, admissible in support of return of service. *Fleming vs. Williams & Co.*, 556.
23. Dying declarations of opinion inadmissible. *Ratteree vs. State*, 570.
24. *Res gesta*, declarations after matter has wholly terminated, inadmissible. *Ibid.*
25. Parol evidence inadmissible to vary will. *Whitehead, adm'r, et al., vs. Park et al.*, 575.
26. Opinion of chemist, after analysis, admissible on issue as to fertilizer sold, but not conclusive. *Wilcox, Gibbs & Co. vs. Hall*, 635.
27. Admissions of agent to bind principal must be shown to have been made within scope of business. *Ibid.*
28. Where several are indicted for assault with intent to murder, and there was crowd present at commission of offense, evidence that some one cried, "kill him," inadmissible. *Harris et al., vs. State*, 640.
29. Parol, ambiguities, latent and patent, explainable by. *Bell vs. Boyd & Brumby*, 643.
30. Copy deed, to introduce, it must be shown that all reasonable means to obtain original, including notice to produce, have failed. *Hadley vs. Bean et al.*, 685.

EXCEPTIONS—BILL OF. See *Practice in Supreme Court*, 2-6, 8-10, 12, 13.

EXECUTIONS.

1. Entry of levy upon established copy of *fi. fa.* prevents a judgment's becoming dormant, even though original be afterwards found and such copy set aside. *Water Lot Co. vs. Bank of Brunswick*, 30.
2. Assignee of *fi. fa.* against firm may proceed against property of any partner, notwithstanding equities existing between members thereof. *Gammell vs. Mulford*, 78.
3. Under acts transferring cases from old inferior court, clerk of county court could issue *fi. fa.* on judgment rendered in former. *Rutherford vs. Crawford*, 138.
4. That name of plaintiff has been twice changed by amendment, no ground to quash execution on judgment obtained in suit. *Brockett, for use, vs. Bradford, sheriff*, 274.
5. Holder of junior notified sheriff of intention to contest senior *fi. fa.* Surplus of fund over amount necessary to satisfy latter was paid to junior. Pending contest defendant in *fi. fa.* died. Widow applied for year's support out of fund in sheriff's hands. Error in the court so to order, and further to direct that sheriff pay amount due on senior *fi. fa.* or be attached. Subsequent facts could not affect liability of sheriff as it existed at time of appropriation of surplus to junior *fi. fa.* *Ibid.*
6. Tax *fi. fa.* for less than \$50 00, with entry of levy on land unsigned, inadmissible without proof that levy was by some authorized person. Recital in deed that sheriff made levy, not such proof. *Jones, Jr., vs. Easley et al.*, 454.

EXECUTORY DEVISE. See *Wills*, 6, 7.

FERRY. See *Roads and Bridges*, 4.

FINES. See *Criminal Law*, 33.

FRAUDS—STATUTE OF. See *Contracts*, 4, 5.

GARNISHMENT.

1. Plaintiff not entitled to judgment against garnishee where answer was filed in vacation subsequent to first term after service of summons, and before judgment against defendant. *Curry vs. National Bank of Augusta*, 28.
2. Where answer admits indebtedness, but sets up indebtedness of defendant to garnishee of larger sum, and plaintiff claims judgment because latter indebtedness is not due, and such fact does not appear from the pleadings, plaintiff must traverse answer. *Ibid.*
3. Garnishee discharged by answer is entitled to judgment for cost. *Ibid.*
4. Garnishee discharges himself by answer, of which there is no traverse. Subsequently a second summons is served under which he returns money into court. No lien attached under first summons. *Daniels vs. Meinhard Bros. & Co. et al.*, 359.
5. If, intermediate the answer to first summons and service of second, the claim due defendant, collected by garnishee, was transferred, the transferee is entitled to fund. *Ibid.*
6. Process directed to A, agent of a corporation, not bind debt due from corporation to defendant unless agent has fund in his hands. *Ibid.*

GUARDIAN AND WARD.

1. That guardian is in debt to ward, gives latter no lien on his estate unless fund can be traced. *Vason, trustee, et al., vs. Bell, adm'r, et al.*, 416.

2. Bill filed affecting interest of non-resident minor legatees who appear by guardian appointed by proper court of their residence; decree rendered thereon without appointment of guardian *ad litem*, irregular but not void. *Ross, adm'r, et al., vs. Southwestern R. R. Co. et al.*, 514.
3. Courts of state of residence of minors have jurisdiction to appoint guardian as to property they may have or acquire there, whether their legal domicile or not. *Ibid.*
4. Foreign guardian, if authorized by law of state of appointment, may sell and transfer stock in railroad company in this state without application to courts here. *Ibid.*

HABEAS CORPUS. See *Municipal Corporations*, 11.

HOMESTEAD.

1. Part payment on land, and improvements, not entitle vendee to homestead in any part thereof as against balance of purchase money. Depreciation of value not affect question. *Cook vs. Crocker*, 66.
2. Proceeds of homestead invested in other property, but by mistake title taken to wife as free trader, purchaser thereof, with notice, will, in equity, hold to same use as was the homestead. *Murray vs. Sells, for use*, 257.
3. Return of appraisers and approval of ordinary on homestead, unappealed from, conclusive upon applicant as to value. *Thrasher vs. Bettis*, 407.
4. Note of purchaser renewed in hands of transferee by new note with security; not such novation as relieves homestead from liability therefor. *Wofford vs. Gaines*, 485.
5. Homestead subject to debts created prior to July, 1868. *Ibid.*
5. Judgment setting homestead apart not conclude creditors to whose debts homestead is subject. *Ibid.*

HOMICIDE—ACTION FOR. See *Parent and Child*, 3.

HUSBAND AND WIFE.

1. Determines at death of husband, trust for sole use of wife does. *Coughlin et al. vs. Seago*, 250.
2. Proceeds of homestead invested in other property, but by mistake title taken to wife as free trader, purchaser thereof, with notice, will, in equity, hold to same use as was the homestead. *Murray vs. Sells, for use*, 257.
3. Although words of deed or will do not create separate estate, yet if husband accepts appointments of trustee and acts thereunder, wife may maintain bill against his legal representative for the property. *Artipe, trust., et al., vs. Goodall, ex'r*, 318.
4. Trust for life of wife, remainder over, income from property belongs exclusively to wife. *Ibid.*
5. Property purchased with such income, and title taken to trustee for wife, protected from marital rights of husband, though no technical separate estate was created by the deed. *Ibid.*
6. Action by trustee for married woman, not abate on her death, where there is no administration, but proceeds for use of those entitled. *Ibid.*
7. Purchasers who do not claim under husband, cannot set up his marital rights to protect their claim to property of wife, when he could not assert them. *Ibid.*

8. *Aliter*, if they claimed under husband, and deed to wife created no separate estate, though they never saw such instrument. *Ibid.*
9. Covenant to stand seized of a sum of money to use of intended wife and children, accompanied by pledge and mortgage of entire estate, by solvent husband, creates a lien valid against creditors present and future. But as to property thereafter acquired invalid. *Vason, trust, et al. vs. Bell, adm'x, et al., 416.*
10. Where trust is enforced in favor of one within marriage consideration, it will be enforced for benefit of volunteers. *Ibid.*
11. Marriage settlement cannot divest legal liens already acquired. *Ibid.*
12. Whether husband, by settlement, disabled himself from paying debts, question of fact. *Ibid.*
13. Section 1783 of Code, which protects separate estate of wife against debts of husband, covers property acquired by her under act of 1866 and constitution of 1868. *Dunbar & Co. vs. Mize, 435.*
14. Mortgage by married woman which recites that debt was contracted by husband for her benefit, does not estop her from showing to contrary. *Ibid.*
15. Divorce, confessions to acts of adultery since marriage, not authorize. *Woolfolk vs. Woolfolk, 661.*
16. Divorce, libellant incompetent to prove adultery on part of respondent. *Ibid.*

IDEM SONANS. See *Criminal Law, 43.*

ILLEGALITY.

1. Forthcoming bond unnecessary unless defendant wishes to replevy; nor is payment of costs on *fi. fa.* condition precedent to acceptance of affidavit. *Tarver et al. vs. Tarver, for use, 43.*
2. Execution proceeding to collect fees due thereon, not stopped by illegality on ground that plaintiff has agreed, for value, to indulge, or that such fees have been paid, unless payment was made by the defendant. *Ibid.*
3. That debt on which judgment is based was illegal, or that plaintiff was an illegal holder of it, cannot be set up by illegality. *Chancy vs. Carrigan, 84.*
4. Payment set up and plaintiff in *fi. fa.* dead, defendant is incompetent witness. *Ibid.*
5. Judgment and *fi. fa.* not follow declaration and verdict, illegality the proper remedy. *Lemoard et al. vs. Collier, 387.*
6. Second illegality only lies for cause not known at time of filing first. *Ibid.*
7. Tax *fi. fa.* about to be enforced against persons not within ordinance, remedy is by illegality. *Goodwin et al. vs. Mayor, etc., of Savannah, 410.*
8. Forthcoming bond, failure to give, no ground of dismissal. *Wynn vs. Knight, 568.*

IMPEACHMENT OF WITNESS. See *Witness, 3, 4.*

INDICTMENT. See *Criminal Law 2, 24, 38.*

INDORSEMENT,

1. Act authorizing municipal corporation to subscribe to stock in ~~railroads~~ and to issue bonds to pay for same, no authority to indorse bonds of railroad company. *Blake et al. vs. Mayor, etc., of Macon et al., 172.*

2. Street railroad company, indorsement of bonds of, not within ordinary administrative powers of a municipal corporation. *Ibid.*
3. To action on indorsement of judgment to be liable if defendant proves insolvent, a plea denying insolvency is not in abatement. *Palmour, for use, vs. Palmour, 381.*
4. Note payable "at Hoyt & Jones" not, on its face, made for negotiation at chartered bank. Nor does allegation in declaration that plaintiffs were bankers doing business under name of Hoyt & Jones, show such fact. *Salmons & Alexander vs. Hoyt & Jones, 493.*

INJUNCTION. See *Equity, 7-14, 18, 24-27, 29, 30, 34, 38, 40, 41.*

INSURANCE,

1. Action against company for damages for failure of agent to renew policy according to promise, must allege that premium was left with agent or that it was paid or tendered. *Croghan, trustee, vs. N. Y. Underwriters' Agency, 109.*
2. Holder of policy may, after loss, assign interest therein to creditor sufficient to cover debt. *Daniels vs. Meinhard Bros. & Co., et al., 359.*
3. Several companies, by common name and agent, issued policy which stipulated that each should be liable for one-fourth of loss. A joint action may be maintained against them and the verdict moulded to conform to contract. *Sutherlin vs. Underwriters' Agency, 442.*
4. Policy for benefit of wife and child; in suit thereon admissions of widow admissible on question of misrepresentation in application. *Southern Life Insurance Company vs. Wilkinson et al., 535.*
5. Delay of several months in giving notice of death, is not an unreasonable time. *Ibid.*
6. At whose instance insurance was procured, etc., may be considered by jury in looking into question of fraudulent representations. *Ibid.*
7. Question whether applicant ever had any serious illness, local disease, affection or personal injury? the adjective serious qualified each of the terms which followed. *Ibid.*
8. Under Code, representations in application for insurance are covenanted to be true. Any variation by which the nature, extent or character of risk is changed, invalidates. *Ibid.*
9. Interest, slight or contingent, legal or equitable, may be insured. *Fenn vs. New Or. M. Ins. Co., 578.*

INTERROGATORIES.

1. Place of execution must appear. *Wannack vs. Mayor, etc., of Macon, 162.*
2. Depositions taken because of age of witness, discretion of court in sending for him, not controlled. *Baker vs. Lyman, ex'x, 339.*

JOINT AND SEVERAL LIABILITY. See *Contracts, 6.*

JUDICIAL COGNIZANCE. See *Evidence, 13.*

JUDICIAL SALE. See *Levy and Sale.*

JUDGE. See *Courts, 3, 4.*

JUDGMENTS.

1. Judgment upon warrant sued out by plaintiffs prior to action of ejectment; against defendant as a tenant at sufferance, where a counter-affi-

- davit denying such tenancy was filed, is conclusive of fact that defendant did not hold as their tenant. *Tomlinson et al. vs. Driver*, 9.
2. Pending suit by corporation, name was changed by act of legislature, if corporators should consent, but judgment was entered in the old name; it is too late for defendant to set up that there was no such corporation, especially if he fails to make it appear that the corporators accepted the new name. *Water Lot Co. vs. Bank of Brunswick*, 30.
 3. Dormant, entry of levy upon established copy of *fi. fa.* prevents judgment's becoming, even though original be afterwards found and such established copy set aside. *Ibid.*
 4. Dormant judgment act was suspended from November 30th, 1860, to July 21st, 1868. *McClaren vs. McCarty*, 41; *Rodgers vs. Bell et al.*, 94.
 5. Limitation act of 1869 not affect judgment not dormant at its passage; plaintiff has three years after dormancy to sue out *fi. fa.* *Ibid.*
 6. Attorneys have same control over judgments, to extent of fees, that clients have; no person can satisfy the same until such fees are paid. *Tarver et al. vs. Tarver*, for use, 43.
 7. It is in the discretion of the court, during the term, to open a judgment. *Estes vs. Ivey, sh'ff, et al.*, 52; *Walton vs. Jones, adm'r*, 91.
 8. Renewal of suit, for purposes of, dismissal dates from time affirmance by supreme court was made judgment of superior court. *Cohen & Menko vs. So. Ex. Co.*, 128.
 9. Where the minutes fail to disclose that a jury was impaneled and sworn, a verdict and judgment entered during that term are, *prima facie*, void. *Rutherford vs. Crawford*, 138.
 10. Whether such defect can be cured by an entry *nunc pro tunc*, as against purchaser from defendant. *Quare?* *Ibid.*
 11. Defective service, judgment not set aside on account thereof after acquiescence for six years. *Hill vs. Hatcher*, 291.
 12. Defective service of original, no ground to set aside judgment at instance of defendant in second original. *Ibid.*
 13. Foreclosure of mortgage, four years possession by purchaser after, not discharge from lien. *Hays vs. Reynolds ex'r*, 328.
 14. Motions to vacate orders setting aside judgments because for slave debts and dismissing suits for failure to file affidavit as to payment of taxes, must be made within that period in which the right of action growing out of the matter *sub judice* would be barred. *Hambrick, adm'r vs. Crawford*, 352; *Mosely vs. Mitchell, trust., et al.*, 356.
 15. Action against administrators of principal of note and security; verdict for plaintiff and judgment against "defendants," containing no words that it should be levied of the goods, etc., in the hands of such administrators. Judgment not void, but irregular and amendable. *Lenoard et al. vs. Collier*, 387.
 16. Former recovery pleaded; doubtful whether record offered to sustain covers matter in controversy, it should be admitted, and question left to jury. *Newton Man. Co. vs. Whites*, 395.
 17. Homestead, return of appraisers with approval of ordinary as to, unappealed from, conclusive on applicant as to value. *Thrashers vs. Betts*, 407.
 18. Excepted to as final judgment, order dismissing attachment may be, where there has been no replevy, though defendant has appeared and pleaded. *Sutherland vs. Underwriters' Agency*, 442.
 19. Suit against four dismissed for misjoinder, but plaintiff permitted to amend by striking out three, thus retaining suit against one. Dismissal

- is final judgment which may be excepted to though amended declaration be still pending. *Ibid.*
20. Levy dismissed by judgment of court, though on illegal ground, plaintiff cannot proceed to trial of claim under same levy. *Patterson vs. Bagley*, 483.
 21. Homestead, judgment setting apart, not conclude creditors to whose debts it is subject. *Wofford vs. Gaines*, 485.
 22. Confession by attorney whose name appeared on docket seven years previous to motion to vacate, and the attorney having since died, requires strongest testimony to show absence of authority. Even then, it should appear what the defense was. *Davant, ex'r et al. vs. Carlton*, 491.
 23. Irregular decree, rights obtained under, protected. *Ross et al. vs. Southwestern R. R. Co. et al.* 514.
 24. *Scire facias* to revive judgment not dormant; that judgment became so pending proceeding, not prevent dismissal. *Shepherd, McCreery & Co. vs. Ryan, ex'r*, 563.
 25. *Scire facias* to revive judgment not dormant, and to make executor of defendant a party; may proceed for latter purpose, and if judgment become dormant, the executor, having been made party, may, by amendment be required to show cause against revival. *Ibid.*

JURISDICTION.

1. Concurrent jurisdiction given to courts of law, not deprive equity of jurisdiction it originally had. *Hardeman & Sparks vs. Battersby* 36.
2. Where courts have concurrent jurisdiction, that first obtaining will retain. *Ibid.*
3. Bill in equity must be filed in the county of the residence of the defendant against whom substantial relief is prayed. *Smith vs. Hornsby et al.*, 182.
4. Misdemeanors, concurrent jurisdiction over, may be conferred on other courts than superior, but cannot be denied to latter. *Porter vs. State*, 236; *Clifton vs. State*, 241.
5. Foreclosure of mortgage on realty should be in county where land lies. *Hackenhull vs. Westbrook*, 285.
6. Will admitted to probate, jurisdiction to set aside vested exclusively in court of ordinary. *Tudor et al. vs. James, adm'r*, 302.
7. Suit against railroad company in county other than that of principal office, although defendant may have pleaded to merits, *onus* on plaintiff to show that contract was made or to be performed in county of suit. *Georgia R. R. & B'g Co. vs. Seymour, adm'r*, 499.
8. Courts of state of residence of minors have jurisdiction to appoint guardians as to property they may have or acquire there, whether such state is their legal domicile or not. *Ross, adm'r, et al., vs. Southwestern R. R. Co. et al.*, 514.

JURY.

1. That one of the grand jurors who found indictment was an alien, good plea. *Reich vs. State*, 73.
2. Juror failing to answer after jury was stricken but before sworn, not error to order panel filled and a restrike. *Clifton vs. State*, 241.
3. That names of one or more jurors who tried murder case were not on lists, no ground of new trial. *Edwards vs. State*, 428.
4. Judges of the law, jurors are so far as to apply instructions given them to the facts. *Ibid.*

5. Real name "Barry," but on lists "Berry" by which last he is generally known, not error to put on defendant. *Rateree vs. State*, 570.
6. Plea that grand jury at previous term, who found indictment, were not sworn, court may determine such issue from inspection of minutes. *Bird vs. State*, 602.
7. Where minutes show that grand jury retired, selected foreman, returned into court and were duly impaneled, it implies that they were sworn. *Ibid.*

JUSTICE OF THE PEACE. See *Appeal*; *Costs*, 6,

LABORER'S LIEN. See *Lien*, 1-4, 10.

LAND.

1. Lower lot owes servitude to higher to receive water which naturally runs therefrom. *Goldsmith vs. Elsas, May & Co.*, 186.
2. Purchaser of mill tract gets with it right to back water to extent vendor had. *Baker et al. vs. McGuire*, 245.
3. Overflow may be made greater by repairs to dam or building of new one, provided height is not increased. *Ibid.*
4. Possession by another is notice to purchaser of his claim. *Franklin, Reid & Co. vs. Newsom et al.*, 580; *Wingfield, adm'r, vs. Davis*, 655.
5. Where lot was, by deed, made permanently chargeable with expense to be incurred, such charge constituted covenant running with land and attached wherever title might be. *Howard Man. Co. vs. Water Lot Co.*, 689.
6. Distinction between personal covenant and covenant running with land. *Ibid.*

LANDLORD AND TENANT. See *Ejectment*, 4, 5.

LAWS.

1. Repeal of law revives former act, when. *In re Bradford, clerk*, 392.
2. Act legitimating child, and deed subsequently made by parent to him as such child, presumed to have been passed on application of parent. *Thrower vs. Wood*, 458.
3. Repeal law not inconsistent therewith, adoption of Code does not, though not embodied therein. *Gault et al. vs. Wallis*, 675.

LEVY AND SALE.

1. Possession held under bond for titles and part of purchase money paid, entire interest stipulated in bond may be levied on, but notice that such is the extent of the levy must be given to the holder of the legal title. *Estes vs. Ivey, sheriff, et al.*, 52.
2. If no such notice be given, nothing is sold but the interest of the defendant, and the vendor cannot claim proceeds on ground that purchase money is not paid. *Ibid.*
3. Cotton levied on turned over by defendant, without sale, to be credited on execution; sheriff not liable to holder of older *f. fa.* subsequently placed in his hands. *Thomas vs. Johnson, sheriff*, 69.
4. Assignee of *f. fa.* against firm may proceed against property of any partner irrespective of equities existing between members thereof. *Gammell vs. Mulford et al.*, 78.
5. Mere notice to sheriff to hold up money collected under process, not justify sheriff in retaining it. *Strickland vs. Smith*, 79.

6. Purchaser failing to comply with bid at administrator's sale, liable for difference on resale. *Daniel vs. Jackson et al., adm'rs, 87.*
7. Advertised terms altered at sale; to hold purchaser liable for difference on resale, actual notice to him must be shown. *Ibid.*
8. Entry of levy on land unsigned is good if signature be attached during official term of the deputy sheriff, or if afterwards perfected under an order of court: or the mistake may be shown by evidence in any case where the validity of such levy is attacked. *Rutherford vs. Crawford, 138.*
9. Execution against two, levy on land "on which defendant's family now lives," should be dismissed as too uncertain. *Anderson vs. Lee, ex'r, 189.*
10. Several lots levied on and sold separately, all for less than *fi. fa.*, question of excessive levy did not arise. *Van Dyke vs. Martin et al., 221.*
11. Inadequacy of price not invalidate judicial sale. *Ibid.*
12. Charge in bill that purchasers combined with sheriff, to deter persons from bidding, prevents chancellor from dismissing, however satisfied he may be of its want of truth. *Ibid.*
13. Superior lien in existence to that in hands of sheriff, no excuse for failure to sell. *Tarver et al. vs. Fleming, 297.*
14. Tax *fi. fa.* for less than \$50 00, with unsigned levy on land thereon, inadmissible in support of sheriff's deed, without proof that levy was by authorized officer. Nor is recital in deed that levy was made by sheriff such proof. *Jones, Jr., vs. Easley et al., 454.*
15. Advertisement of sale under tax *fi. fa.* for thirty days, sufficient under charter and ordinances of Rome, in 1863. *Mitchell, trustee, vs. King, 470.*
16. Void process, levy and sale under; plaintiff in *fi. fa.* liable for trespass, though sale was also under legal *fi. fa.* *Boyd vs. Merriam, 561.*
17. Bond, to make sale of land held under valid, deed must be filed and recorded prior to levy. *Upchurch vs. Lewis et al., 621.*
18. Mere presence of obligee at sale, he being ignorant of failure to file and record deed, not estop him. *Ibid.*
19. Declaration by common agent of administrator and purchaser, at sale, that sale was made to perfect title of person for whom land was bid off, renders sale open to review. *Nosworthy et al. vs. Blissard, 668.*
20. Title nevertheless protected to extent that purchase was of value to estate. *Ibid.*

LIEN.

1. Laborer's lien does not attach through work done by other persons hired by creditor. *Cochran vs. Swann, 39.*
2. To authorize recovery, plaintiff must show what work was done by him individually and the value thereof. *Ibid.*
3. Proceeding on lien cannot be amended into ordinary action. *Ibid.*
4. Decree in case to which laborer was not a party, no adjudication that lien of complainant was superior to his. *Tarver et al. vs. Fleming, 297.*
5. Mortgage, judgment of foreclosure, four years possession by purchaser after, not discharge from lien of. *Hays vs. Reynolds ex'r, 328.*
6. Covenant to stand seized of a sum of money to use of intended wife and children, accompanied by pledge and mortgage of entire estate, by solvent husband, creates a lien valid against creditors, present and future. *Vason, trustee, et al. vs. Bell, adm'x, et al., 416.*

7. Property thereafter to be acquired, lien to operate on is on mere possibility, and invalid. *Ibid.*
8. Trust money creates no lien unless it can be traced. *Ibid.*
9. Marriage settlement cannot divest legal liens already acquired. *Ibid.*
10. Laborer employed by another mechanic to work on building, who accepts from employer, in discharge of indebtedness, owner's note, has no lien. *Ibid.*
11. Machinist's lien cannot be enforced as lien against steamboat, but as mechanic's lien. *Columbus I. W. Co. vs. Loudon, assignee, 433.*
12. Counter-affidavit unnecessary to enable defendant to move to quash summary execution. *Ibid.*
13. Q. buys from C, paying part of purchase money and taking bond for titles. He sells part of land to L, who pays price. F. R. & Co., for Q., advance to C. balance of purchase money, who thereupon convey to Q., the latter immediately conveying to F. R. & Co., to secure them: *Held*, that F. R. & Co., stand in the place occupied by C. as to purchase money advanced. They are entitled to decree for sale of land not sold by Q., and if that be insufficient, then for sale of balance. *Franklin, Reid & Co. vs. Newsom et al., 580.*

LIMITATIONS—STATUTE OF.

1. Especially should a demurrer to a bill be overruled, where, if sustained, complainant would be barred. *Hardeman & Sparks vs. Battersby, 36.*
2. Judgment not dormant at passage of limitation act of 1869, not affected thereby; plaintiff has three years from dormancy to sue out *sci. fa.* *McClaren vs. McCarty, 41.*
3. Deed made in 1863 when land was in adverse possession of third person; action brought on warranty after January 1st, 1870, barred by act of 1869. *Durand vs. Williams, 76.*
4. Renewal of suit within six months from date that affirmance of dismissal by supreme court was made judgment of superior court, though no *supersedeas* was obtained, not barred. *Cohen & Menko vs. So. Ex. Co., 128.*
5. Though complainant purchased land, taking bond for titles thereto prior to June 1st, 1865, yet if the acts of which he complains, transpired after that time, though growing out of original purchase, he is not barred by act of March 16, 1869. *Smith vs. Hornsby et al., 182.*
6. Statutory liability not created by subscription to stock of company incorporated by act of legislature. *Georgia Man. and P. M. Co. vs. Amis, 228.*
7. Mortgage, judgment of foreclosure of, four years possession by purchaser after, not discharge from lien of. *Hays vs. Reynolds, ex'r, 328.*
8. Motions to vacate orders setting aside judgments because for slave debts and dismissing suits for failure to file affidavit as to payment of taxes, must be made within that period in which the right of action growing out of the matter *sub judice* would be barred. *Hambrick, adm'r, vs. Crawford, 352; Mosely vs. Mitchell, trustee, et al., 356.*
9. Fraud, that plaintiff has been deterred from his action by, no reply to prescriptive title, unless defendant, or those under whom he claims, have been guilty, or had knowledge of such fraud. *Ross, adm'r, et al., vs. Central R. R. and B'k'g Co., 371.*
10. Limitation act of 1856, and section 2688 of Code, as to prescription against unrepresented estates, apply to causes of action existing at time of passage of act of 1856, so far as to require such estates to be represented within five years. *Ibid.*

LOST PAPERS. See *Judgments*, 3.

MACHINIST'S LIEN. See *Lien*, 11, 12.

MARKET. See *Municipal Corporations*, 10.

MARRIAGE SETTLEMENT. See *Husband and Wife*, 3-5, 7-12.

MINUTES. See *Courts*, 1.

MISTAKE. See *Equity*, 20, 22, 38; *Sales*, 1.

MORTGAGE.

1. Bankruptcy of mortgagor and claim of mortgaged property as home-
stead, mortgagee never having entered bankrupt court, no ground to
stay proceedings of foreclosure. *Hatcher vs. Jones*, 208.
2. Foreclosure on realty must be in county where property lies. *Hacken-
hull vs. Westbrook*, 285.
3. Judgment of foreclosure, four years possession by purchaser after, not
discharge from lien. *Hays vs. Reynolds, ex'r*, 328.
4. Prescription, title by, claimant obtains who holds for seven years under
independent title. *Aliter*, if privy in estate with mortgagor. *Stokes
vs. Maxwell et al.*, 657.

MUNICIPAL CORPORATIONS.

1. City council of Columbus has no jurisdiction to try for offense of keep-
ing open tippling-house on Sabbath day. *Reich vs. State*, 73.
2. Act authorizing subscription to stock of railroad and to issue bonds to
pay for same, no authority to indorse bonds of railroad company.
Blake et al. vs. Mayor, etc., of Macon et al., 172.
3. Neither the act of 1871 amending charter of Macon, nor act of 1874
regulating manner in which municipal corporations shall issue bonds,
authorizes the issue of any for which there is not other special legisla-
tive authority. *Ibid.*
4. Indorsement of bonds of a street railroad company, not within ordinary
administrative powers of a municipal corporation. *Ibid.*
5. Streets, failure to work on, Mayor, etc., of Dalton may fine therefor and
enforce payment by imprisonment. *Cobb vs. Mayor, etc., of Dalton*,
426.
6. Advertisement of sale under tax *fi. fa.* for thirty days, sufficient under
laws and ordinances of Rome in 1863. *Mitchell, trustee, vs. King*, 470.
7. That land was used only for agricultural purposes, and that owner de-
rived no benefit from city government, no ground to enjoin collection
of municipal taxes. *Linton vs. Mayor, etc., of Athens*, 588.
8. Notice of defect in sidewalk to municipal authorities, presumed where
it has existed such a time as by reasonable diligence they ought to
have ascertained it. *Mayor, etc., of Atlanta vs. Perdue*, 607.
9. That owner of lot left strip of land in his front unfenced, where it was
used by him and the public in common for upwards of twenty years,
constituted no such dedication as would authorize the authorities to
ditch the length of such strip, seriously obstructing the owner's ingress
and egress to the balance of his property. *Mayor, etc., of Madison
vs. Booth*, 609.
10. Law authorizing corporation to prohibit sale of fresh fish and vegeta-
bles, during market hours, at any other place than market-house, con-
stitutional. *Badkins vs. Robinson, marshal*, 613.

11. Where it was further provided that no person should be punished except such as usually bring marketable articles for sale, etc., whether a party prosecuted was within exception was matter of proof on trial and cannot be inquired into on *habeas corpus* sued out after conviction. *Ibid.*
12. Though assessment upon specific tax imposed by state on lawyers, etc., be forbidden, yet corporations may tax the business. *Mayor, etc., of Savannah vs. Hines et al., 616.*
13. Ferry, authorities of Athens have no power to carry on though within corporate limits. *Cooper vs. Mayor etc., of Athens, 638.*
14. Corporation, therefore, not liable for negligence of ferryman. *Ibid.*

NEW TRIAL.

1. Verdict required by testimony independently of illegal evidence, or of erroneous charge, new trial refused. *Tomlinson et al., vs. Driver, 9; Osmore, vs. Hood & Kiddoo, 114; Reed & Daniel vs. Gallaher, 456; West. & At. R. R. Co. vs. Camp, 596.*
2. Refusal of continuance because defendant's health prevented her from attending court, no ground of new trial where affidavit fails to show her condition at time of trial, or wherein she was damaged by her absence. *Bowling, adm'x, vs. Whalley, 24.*
3. *Plene administravit* pleaded, but, after charge of court, was withdrawn, defendant cannot, on motion for new trial, assign error upon ruling of court made upon basis of such plea being in. *Ibid.*
4. Verdict unsupported by evidence, new trial granted. *Jenkins vs. State, 33; Sears vs. Cent. R. R. & B'g Co., 630.*
5. Erroneous ruling complied with, cannot be made ground of new trial. *Hutchinson & Bro. vs. Jackson 56; Clifton vs. State, 241.*
6. Verdict sustained by testimony, new trial properly refused. *Barnes vs. State, 143; Bray & Bro. vs. Gunn, 144; Curtin & Tumlin vs. Munford & Gibreath, 168; Jackson vs. State, 195; Clifton vs. State, 241; Spears vs. State, 252; Arnold vs. State, 325; Palmour, for use, vs. Palmour, 381; Edwards vs. State, 428.*
7. Verdict for more than is justified, and court below having granted new trial, this court not reverse judgment by requiring excess to be written off. *Brown vs. Eagle & P. Man. Co., 153.*
8. Newly discovered evidence, motion on ground of sustained by affidavit of witness, but facts therein stated controverted by other affidavits, judgment granting new trial not interfered with. *Wannack vs. Mayor, etc., of Macon, 162.*
9. Evidence not objected to on trial, admission no ground of error. *Curtin & Tumlin vs. Munford & Gibreath, 168; Clifton vs. State, 241.*
10. Where brief of evidence was agreed to but not filed within the sixty days prescribed by order, and at time fixed for hearing, it was inconvenient for the judge to pass on motion, so he approved the brief and ordered it filed without limitation as to time, and no objection was then made for failure to file within time first prescribed, discretion of court refusing to dismiss when motion was heard, not controlled. *Selma, R. & D. R. R. Co. vs. Krith, 178.*
11. Conflicting evidence, new trial refused. *Wilcoxon Man. Co. vs. Bohanan & Morgan, 219; Murray vs. Sells, for use, 257; Vasou, trans., et al., vs. Bell, adm'x, et al., 416.*
12. Discretion refusing new trial not controlled where no error of law is complained of. *Chat. Man. Co. vs. Skultze, 225.*

13. Entire charge not in record, presumed to have been correct as applicable to facts, and failure to charge request no ground of new trial. *Spears vs. State*, 252.
14. Murder, doubtful if case was made out, new trial granted. *Cooper vs. State*, 256.
15. Charge, verdict contrary to, new trial granted. *Perdue vs. Bailey*, 333.
16. Judgment of court, where facts are submitted, treated as if a verdict. *Vason, trust., et al., vs. Bell, adm'r, et al.*, 416; *Ross, adm'r, et al., vs. Southwestern R. R. Co. et al.*, 514.
17. Discretion of court granting new trial not interfered with. *Campbell vs. At. & R. A. L. R. Co.*, 488; *Fenn vs. New Or. M. Ins. Co.*, 578; *Brown vs. Hanson*, 632; *Upchurch vs. Lewis et al.*, 621.
18. Newly discovered evidence to effect that administration was granted on estate of person of same name as plaintiff's lessor, and that such lessor actually resided in the county of such administration, is such proof of death as to require new trial. *Clark vs. Pearson et al.*, 496.
19. Judgment refusing new trial not reversed where all the evidence is not sent up. *West. & At. R. R. Co. vs. Camp*, 596.
20. Newly discovered evidence not merely cumulative, ground of. *Woolfolk vs. Woolfolk*, 661.

NOVATION. See *Contracts*, 8.

ORDER OF ARGUMENT. See *Claims*, 7.

ORDINARY.

1. Sureties on bond of, not liable to lowest bidder for failure to award contract for building bridge to him. *Smith, gov., for use, vs. Stapler et al.*, 300.
2. Jurisdiction to set aside will admitted to probate, vested exclusively in court of ordinary. *Tudor et al. vs. James, adm'r*, 302.

PARENT AND CHILD.

1. Minor hired out by parent for one year; employer should only discharge on notice to parent. *Day vs. Oglesby*, 646.
2. If discharged without such notice, parent may recover for time labor was performed. *Ibid.*
3. Homicide of son, parent cannot recover for without alleging and showing pecuniary damage. *Bell et al. vs. Wooten et al.*, 684.

PARTNERSHIP.

1. Parties holding themselves out as doing business in firm name are partners as to third persons. *Barnett L. of S. vs. Blackman & Chandler*, 98.
2. Father and son farm together; former to furnish land, stock and provisions; son to furnish hands and to superintend work; crop to be equally divided; constitutes partnership as to public. *Adams vs. Carter*, 160.
3. Defendants agreed to pay plaintiffs for six tons of ore per day at \$3 00 per ton for twelve months. Before expiration of twelve months, one of defendants secured appointment of receiver to take charge of business and to continue it. The evidence disclosed that this resulted to his benefit. In a suit against the firm for price of ore such defendant is liable. *Curtin & Tumlin vs. Mumford & Gilreath*, 168.

4. Unauthorized act of partner after dissolution not repudiated in reasonable time after knowledge, is ratified. *Roberts & Co. vs. Barrow et al.*, 314.
5. Tax on partnership engaged in practicing law same as on individuals, right in principle. To tax each partner separately would be unjust and unequal. *Mayor, etc., of Savannah, vs. Hines et al.*, 616.

PARTY. See *Corporations*, 8.

PAYMENT. See *Principal and Agent*, 6, 7.

PLEADINGS.

1. *Plene administravit* pleaded, but after charge of court, was withdrawn; defendant cannot, on motion for new trial, assign error upon ruling of court made on basis of such plea being in. *Bowling, adm'r, vs. Whitley*, 24.
2. Pending suit by corporation, name was changed by act of the legislature, if corporators should consent, but judgment was entered in the old name; it is too late for defendant to set up that there was no such corporation, especially if he fails to make it appear that the corporators accepted the new name. *Water Lot Co. vs. Bank of Bruns.*, 30.
3. Plea that witnesses on whose testimony indictment was found, were neither sworn in open court nor on proper oath, without stating names of witnesses nor oath taken, not good. *Reich vs. State*, 73.
4. Demurrer in equity, too late to file at trial term. *Mayor, etc., of Atlanta vs. Central R. R. and Banking Co.*, 120.
5. Evidence unauthorized by pleadings admitted without objection, may be considered by jury. *Artope, trustee, et al., vs. Goodall, ex'r*, 318.
6. Garnishment directed to A, agent of corporation, not bind debt due by principal to defendant unless agent has fund in hand. *Daniels vs. Meinhard Bros. & Co., et al.*, 359.
8. Indorsement on judgment to be liable if defendant proves insolvent, and action thereon. Plea denying insolvency is not in abatement. *Palmour, for use, vs. Palmour*, 381.
9. Cotton stored in certain house sold, purchaser takes other with it; seller may sue in *tort* or *assumpsit*. *Newton Man. Co. vs. Whites*, 395.
10. Insurance companies, by common agent and name, issue policy, which stipulated that each should be liable for one-fourth of loss. An action may be maintained against them jointly, and the verdict moulded to conform to contract. *Sutherland vs. Underwriters' Agency*, 442.
11. Actions on notes for purchase money; aggregate defense of recompement and set-off exceed jurisdiction of court. Former should be pleaded to one suit; latter to other. *Collins vs. Clayton, trustee*, 699.

PRACTICE IN THE SUPERIOR COURT.

1. Proper practice for court, on rule to distribute money, to require parties to state in writing their respective claims, and the grounds thereof. *Estes vs. Ivey, sheriff, et al.*, 52.
2. Claim of one of the parties having been dismissed because presenting no case on its face, and fund awarded to others, whilst it was in the discretion of the court, during the term, to open the judgment and allow an amendment, yet it was not error to refuse so to do during the progress of another trial, and especially where it is not stated what the proposed amendment was. *Ibid.*
3. Improper for court to ask counsel, in presence of jury, if they will consent for jury to disperse on agreeing to verdict. *Wannack vs. Mayor, etc., of Macon*, 162.

4. Agreement of counsel as to facts, party introducing cannot prove contradictory fact except on notice. *Southwestern R. R. Co. vs. Atlantic and G. R. R. Co.*, 401.
5. Failure to respond to notice to produce paper, where it affirmatively appears that the instrument is lost, not authorize judgment by default. *Sutherlin vs. Underwriters' Agency*, 442.
6. Plea of not guilty and conviction thereon, too late to object to verdict and rulings on previous trial of issue formed on special plea. *Bird vs. State*, 602.

PRACTICE IN THE SUPREME COURT.

1. Bankruptcy of plaintiff in error since verdict against him in ejectment in superior court, no ground of staying proceedings. *Alston vs. Wingfield, adm'r*, 18.
2. Excepted to as final judgment, order dismissing attachment may be where there has been no replevy, though defendant may have appeared and pleaded. *Sutherlin vs. Underwriters' Agency*, 442.
3. Suit against four dismissed for misjoinder, but plaintiff permitted to amend by striking out three, thus retaining suit against one. Dismissal is final judgment which may be excepted to, though amended declaration be still pending. *Ibid.*
4. Judgment rendering *mandamus* absolute cannot be taken up in summary manner provided for injunctions, etc. *Mayor & C. of Athens vs. Long et al.*, 493.
5. Exception to refusal of injunction brought up, but case not set before heel of docket is reached, dismissed. *McIntyre vs. Hurst et al.*, 499.
6. Dissolve injunction, refusal of motion to not subject to review in summary manner, even though at the instance of new parties. Applicable also to order refusing to vacate appointment of receiver. *Ballin & Co. et al. vs. Ferst & Co. et al.*, 551.
7. Defendant dies after argument, but before judgment in criminal case; no decision pronounced. *Herrington vs. The State*, 552.
8. Clerk's certificate to bill of exceptions has seal of court, but no signature, writ of error dismissed. *Davis vs. Sims, adm'r*, 552.
9. No certificate of clerk attached to bill of exceptions, but in same package is found certificate not identified as belonging to any case, which was forwarded after other papers, in response to notice from clerk of supreme court; writ of error dismissed. *Corley & Dorsett vs. Ga. R. R. B'k'g Co.*, 553.
10. Service, absence of, not cured by fact that defendant was the clerk who certified the papers. *Grady, trustee, et al., vs. Barden*, 553.
11. Judgment refusing new trial not reversed, where all the evidence is not sent up. *Western and Atlantic R. R. Co. vs. Camp*, 596.
12. Plea of not guilty and conviction thereon, too late to object to verdict and rulings on previous trial of issue formed on special plea. *Bird vs. State*, 602.
13. General exception to entire charge, insufficient. *Harris et al. vs. Harris et al.*, 678.

PRESCRIPTION.

1. Use of private way through improved lands, to constitute prescriptive right, must have been uninterrupted. *Puryear vs. Clements et al.*, 232.
2. Private way established at instance of defendant, not bound to keep same in repair through his own land for benefit of those who may have acquired prescriptive right. *Ibid.*

3. Mortgage, four year's possession by purchaser after judgment of foreclosure, not discharge from lien. *Hays vs. Reynolds, ex'r, 328.*
4. Time purchaser was in possession prior to levy, cannot be tacked to time which elapsed after sale, prior to ejectment under title obtained thereat, to make out title by prescription. *Marsh vs. Griffin, 330.*
5. Fraud, that plaintiff has been deterred from his action by, no reply to prescriptive title unless defendant, or those under whom he claims have been guilty, or had knowledge, of such fraud. *Ross, adm'r, et al., vs. Central R. R. and Bank'g Co., 371.*
6. Limitation act of 1856, and section 2688 of Code as to prescription against unrepresented estates, apply to causes of action existing at time of passage of act of 1856, so far as to require such estates to be represented within five years. *Ibid.*
7. Property sued for sent out of state by defendant without fraud or concealment, does not prevent its setting up title by prescription. *Southwestern R. R. Co. vs. Atlantic and Gulf R. R. Co., 401.*
8. Purchase by absolute deed, without notice that vendor only held bond, with seven years possession, gives title by prescription. *Wingfield, adm'r, vs. Davis, 655.*
9. Mortgagor, claimant holding for seven years under independent title, obtains good prescriptive right: *Aliter*, had he been privy in estate with. *Stokes vs. Maxwell et al., 657.*

PRESUMPTIONS.

1. If attesting witness to deed be a magistrate, presumption is that he saw instrument legally executed. *Highfield et al. vs. Phelps et al., 59.*
2. Entire charge not in record, presumed correct. *Spears vs. State 252.*
3. Act legitimating child, and deed subsequently made to him as such child by the parent, presumed to have been passed at instance of parent. *Thrower vs. Wood, 458.*
4. Notice of defect in sidewalk to municipal authorities presumed, where defect has existed for such a time as by reasonable diligence it ought to have been known. *Mayor, etc., of Atlanta vs. Perdue, 607.*

PRINCIPAL AND AGENT.

1. Principal informed of deviation of agent from instructions, but fails to ratify or disapprove, agent not liable. *Bray & Bro. vs. Gunn, 144.*
2. Letter from book-keeper of manufacturing company to defendant, without proof of authority, inadmissible to show goods not sold but sent on consignment. *Wilcoxon Man. Co. vs. Bohanan & Morgan, 219.*
3. Unauthorized act of partner after dissolution, not repudiated within reasonable time after knowledge, is ratified. *Roberts & Co. vs. Barrow et al., 314.*
4. Garnishment directed to A, agent of corporation, not bind debt due by principal to defendant unless such agent has fund in hand. *Daniels vs. Meinhard Bros. & Co. et al., 359.*
5. Declarations of agent only bind principal when made *dum fervet opus*. *Newton Man. Co. vs. Whites, 395.*
6. Inference that agent is authorized to collect money due on written security in his possession, ceases when withdrawn, and this though indebtedness was contracted through agent. *Guilford & Co. vs. Stacer, 618.*
7. Payment to one not in possession of security, *onus* on debtor to show his authority to collect. *Ibid,*

8. Admissions of agent to bind principal must be shown to have been made within scope of business. *Wilcox, Gibbs & Co. vs. Hall*, 635.

PRINCIPAL AND SECURITY.

1. Act of creditor by which the security may be injured, if done by consent of latter, not operate as a discharge. *Burns vs. Parks*, 61.
2. Sureties on bond of ordinary not liable to lowest bidder for failure to award contract for building bridge to him. *Smith, gov., for use, vs. Stapler et al.*, 300.

PROCESS.

Second original, process attached to valid though none appended to original. *Hill vs. Hatcher*, 291.

PRODUCTION OF PAPERS. See *Practice in Superior Court*, 5.

PROMISSORY NOTES.

1. After the maturity of note, maker wrote across its face: "I agree to pay ten per cent. on this bill till paid;" this did not fix a new day of payment. Nor was it competent to show the agreement upon such new day by parol, unless it was omitted from the writing by accident, fraud or mistake. *Alston vs. Wingfield, adm'r*, 18.
2. Vendee not to have possession until note for \$1,000 00 was paid; two days before it became due, in consideration of payment of \$400 00 then made, vendor agreed to give possession and ample time to pay balance. A delay of fifteen months before suit was "ample time." *Cook vs. Crocker*, 66.
3. Parol, competent to show consideration by, where none is expressed in note. *Boynnton vs. Twitty et al., adm'rs*, 214.
4. Note payable "at Hoyt & Jones," does not, on its face, show that it was made for negotiation at chartered bank. Nor is allegation in declaration against indorsers that plaintiffs were bankers doing business under name of Hoyt & Jones, with claim of protest fee, sufficient to show fact. *Salmons & Alexander vs. Hoyt & Jones*, 493.

RAILROADS.

1. Employee of railroad company, to work on track, injured whilst being transported from point of employment to place of spending night, comes within sections 2083, 3034 of Code, so far as his right to recover is affected by his negligence. *Atlanta & Richmond A. L. R. Co. vs. Ayres*, 12.
2. Notwithstanding negligence of agents of company, plaintiff not entitled to recover if he could have avoided consequence to himself by the exercise of ordinary diligence. *Ibid.*
3. Both parties negligent, damages should be decreased in proportion to negligence of plaintiff. *Ibid.*
4. Rule established in *Macon and Western Railroad Company vs. Johnson*, 38 Georgia, 408, for estimating damages to widow for homicide of husband, affirmed. Amount should be decreased in proportion to contributory negligence of husband. *Ibid.*
5. Owner of franchise contracts with railroad company that the latter shall construct bridge and keep it in repair, but former to be entitled to all tolls except on freight and passengers of the company; in case of damage to wagon and team by falling through, action should be brought against owner of franchise. *Tift vs. Towns*, 47.

6. Where deed was made to state for right of way of its railroad, of such land as may be designated by chief engineer, grantor and privies are bound by his location. *Dougherty vs. West. & At. R. R. Co.*, 304.
7. Any question as to chief engineer's having abused his power should have been made at time of location. *Ibid.*
8. Connecting line, last of receives cars so crowded that hogs die before reaching destination; *prima facie* responsible, but may show suffocation prior to its receipt of cars. *Paramore vs. West. R. R. Co.*, 383.
9. Employee suing for damages must show himself without fault. *Campbell vs. At. & R. A. L. R. Co.*, 488.
10. Suit against company in county other than that of principal office, *owns* on plaintiff to show that contract was made or to be performed in county of suit, although defendant may have pleaded to merits. *Ga. R. R. & B'g Co. vs. Seymour, adm'r*, 499.
11. Agent of Georgia Railroad in Greene county pays up amount claimed to be due in Richmond county, his right to recover over-payment is on an implied contract which is neither made nor to be performed in Greene. *Ibid.*
12. Conductor of freight train, no part of duty to couple cars except in case of pressing emergency. If killed whilst thus engaged, he is not without fault. *Sears vs. Cent. R. R. & B'g Co.*, 630.

RECEIPT. See *Evidence*, 15.

RECOGNIZANCE. See *Criminal Law*, 16.

RECOUPMENT. See *Set-off*, 2, 3.

REMAINDER.

1. Suit against trustee who was life tenant, on individual debt, seeking to charge estate, and judgment by default; sale of trust property under *fi. fa.* enjoined for protection of remaindermen. *Keaton, trustee, vs. Baggs & Stephens et al.*, 226.
2. Bequest of money to widow for life, remainder over, executor should invest principal and pay over interest to widow, thus preserving former. *Chisolm et al. vs. Lee, ex'r*, 611.

RENEWAL OF SUIT. See *Limitations—Statute of*, 4.

REPEAL. See *Laws*, 1, 3.

REVIEW—BILL OF. See *Equity*, 32.

RIGHT OF WAY. See *Railroads*, 6, 7; *Constitutional Law*, 1-8.

ROADS AND BRIDGES.

1. Owner of franchise contracts with railroad company that the latter shall construct bridge and keep it in repair, but former to be entitled to all tolls except on freight and passengers of the company; in case of damage to wagon and team by falling through, action should be brought against owner of franchise. *Tift vs. Towns*, 47.
2. Diligence of owner of bridge franchise must be such as every prudent man would exert in relation to the same property. *Ibid.*
3. Sureties on bond of ordinary not liable to lowest bidder for failure to award contract for building bridge to him. *Smith, gov., for use, vs. Stapler et al.*, 300.

4. Ferry, authorities of Athens have no power to carry on, though within corporate limits. *Cooper vs. Mayor, etc., of Athens*, 638.

SALES.

1. Conditional sale made to secure purchase money; attorneys to collect, in ignorance of fact, take mortgage; clients may still rely on title. *Jones vs. Albin, Sons & Co.*, 585.
2. Fertilizer, seller warrants it merchantable and reasonably suited to use intended. Does not warrant against seasons or bad cultivation. *Wilcox, Gibbs & Co. vs. Hall*, 635.
2. Opinion of chemist after analysis, admissible evidence but not conclusive. *Ibid.*

SCIRE FACIAS.

1. Entry by solicitor general of receipt of \$5'00 as his cost on original *sci. fa.*, no discharge of bond. *Williams vs. Jenkins, gov.*, 166.
2. Judgment not dormant, *sci. fa.* to revive; that judgment became so pending proceeding not prevent dismissal. *Shepherd, McCreery & Co. vs. Ryan, ex'r*, 563.
3. Judgment not dormant, *sci. fa.* to revive and to make executor of defendant a party, may proceed for latter purpose, and if judgment become dormant, executor, having been made party, may, by amendment, be required to show cause why it should not be revived. *Ibid.*

SERVICE.

1. Though copy served defective, yet if defendant had notice of suit and was present at court, he cannot object to *fi. fa.* by illegality. *Pittman vs. Jones et al.*, 134.
2. Return of officer cannot be contested after first term. *Ibid.*
3. Acknowledgment of service on separate piece of paper with no case stated thereon, but proved, on motion to set aside judgment, to have been meant for case at bar, valid. *Hill vs. Hatcher*, 291.
4. Judgment not set aside for defective service where it has been acquiesced in for six years. *Ibid.*
5. Defective service of original no ground to set aside judgment at instance of defendant in second original. *Ibid.*
6. Return of service by sheriff, requires strongest evidence to overcome. *Davant, ex'r, et al., vs. Carlton*, 491; *Fleming et al. vs. Williams & Co.*, 556.
7. Service on bill of exceptions, absence of, not cured by fact that defendant was the clerk who certified the papers. *Grady, trustee, et al., vs. Barden*, 553.
8. Return of sheriff, competent to introduce, in support of, docket kept by him showing similar entry. *Fleming vs. Williams & Co.*, 556.
9. Though corporation has no place of business and no one in office to serve, yet remedy is provided in section 3370, Code. *Young vs. Moses*, 628.

SERVITUDE. See *Land*, 1-3, 5, 6; *Ways*, 1, 2.

SET-OFF.

1. Advantage to owner from taking land for public use cannot be set-off against actual value, but may be considered in estimating claims for other damages. *Mayor, etc., of Atlanta vs. Central R. R. and B'k'g Co.*, 120.

2. Equity not aid in matters of set-off and recoupment where legal remedies are ample. *Collins vs. Clayton, trustee*, 699.
3. Actions, several, for purchase money; recoupment may be pleaded to one or more, and set-off of usury to others. *Ibid.*

SETTLEMENT. See *Criminal Law*, 16, 30.

SHERIFF.

1. Cotton levied on turned over by defendant, without sale, to be credited on execution; sheriff not liable to holder of older *f. fa.* subsequently placed in his hands. *Thomas vs. Johnson, sheriff*, 69.
2. Mere notice to hold up money collected under process not justify sheriff in retaining it. *Strickland vs. Smith*, 79.
3. Signature of deputy sheriff to levy, omitted by mistake, may be attached during his official term, but not afterwards, except under order of court. *Rutherford vs. Crawford*, 138.
4. Holder of junior notified sheriff of intention to contest senior *f. fa.* Surplus of fund over amount necessary to satisfy latter was paid to junior. Pending contest, defendant in *f. fa.* died. Widow applied for year's support out of fund in sheriff's hands. Error in the court so to order, and further to direct that sheriff pay amount due on senior *f. fa.* or be attached. Subsequent facts could not affect liability of sheriff as it existed at time of appropriation of surplus to junior *f. fa.* *Brockett, for use, vs. Bradford, sheriff*, 274.
5. Process, failure to execute is contempt. *Tarver et al vs. Fleming*, 297.
6. Return of service, requires strongest evidence to overcome. *Davant, ex'r, et al., vs. Carlton*, 491; *Fleming vs. Williams & Co.*, 556.
7. Award on bill to which sheriff was formal party, not estop him from traversing recitals charging him with money. *Colbert, sheriff, vs. Parish & Co. et al.*, 554.
8. In support of return of sheriff, competent to introduce docket kept by him showing similar entry. *Fleming vs. Williams & Co.*, 556.

SLANDER.

1. "He has perjured himself; he swore lies before the court at Madison, according to the church book," actionable *per se*. *Brown vs. Hanson*, 632.
2. Where the words charged are the above, omitting "according to the church book," and the latter appear in proof, the variance is not fatal. *Ibid.*

SPECIFIC PERFORMANCE. See *Equity*, 37.

STATE.

1. Municipal corporation enjoined from taking property of state for street purposes. *Mayor, etc., of Atlanta vs. Cent. R. R. and Bank'g Co.*, 120.
2. Where deed was made to state for right of way of its railroad, of such land as may be designated by chief engineer, the grantor and privies are bound by his location. *Dougherty vs. Western and Atlantic R. R. Co.*, 304.
3. Any question as to chief engineer's having abused his power should have been made at time of location. *Ibid.*
4. Agreement of officers of road, or their acquiescence, unless by authority of law, not binding on state. *Ibid.*

5. These principles are true whether the fee or an easement only passed-by the deed. *Ibid.*

STATUTE OF FRAUDS. See *Contracts*, 4, 5.

STATUTE OF LIMITATIONS. See *Limitations—Statute of*.

STOCK IN CORPORATION. See *Corporations*, 4, 6.

STREETS. See *Municipal Corporations*, 5, 8, 9.

TAXES.

1. A masonic lodge, being a charitable institution, together with houses belonging to it, exempt. *Mayor and Ald. of Savannah vs. Solomon's Lodge*, 93.
2. The grand jury having recommended the levy of tax sufficient to defray county expenses, and the legislature having passed an act authorizing an extraordinary tax for county purposes over the per cent. then allowed by law, the order of the ordinary levying such extra tax was not void. *Gilbert et al. vs. County of Dougherty*, 191.
3. The collector paying over the money collected by him will be protected by the order of the ordinary and the judgment of the court against the tax payers. *Ibid.*
4. The order of the ordinary is the best evidence of his intention as to the amount of the tax, his conversation to the contrary notwithstanding. *Ibid.*
5. Unconstitutional, tax on carrier graduated according to number of drays, etc., employed, is not. *Goodwin et al. vs. Mayor, etc., of Sav.*, 410.
6. Where complainants seeking injunction against tax, show themselves not within ordinance, remedy is by illegality. *Ibid.*
7. Advertisement of sale under tax *fa. fa.* for thirty days, sufficient under charter and ordinances of Rome in 1863. *Mitchell, trustee, vs. King*, 470.
8. Taxation is question of power, and the exercise thereof is vested in the legislative department. When that department has exercised its judgment, courts cannot interfere unless the fundamental law has been violated. *Linton vs. Mayor, etc., of Athens*, 588.
9. That land within a municipal corporation was used for agricultural purposes only, and that owner derived no benefit from city government, no ground to enjoin collection of municipal tax. *Ibid.*
10. Though municipal corporation be forbidden to make assessment upon specific tax imposed by state on lawyers, etc., yet it may tax the business. *Mayor, etc., of Savannah vs. Hines et al.*, 616.
11. Partnership should pay same amount as individual where business is taxed. *Ibid.*

TENDER.

1. Promise to pay by given date to an administrator \$451 00, which is to be discharged in demands held against the estate to the extent that the latter is sufficient to pay the debts thereof; maker not bound to tender such demands on maturity of his obligation or forfeit rights. *Williams vs. Dooly, adm'r*, 71.

TRESPASS. See *Levy and Sale*, 16.

TRUSTS.

1. Defendant held under sale made by virtue of order of chancellor which plaintiffs claim to be illegal. Even if true, yet, if the indebtedness to defendant, which was the consideration of the purchase, was contracted for the benefit of plaintiffs and of the property in controversy, they cannot recover. *Askeu, ex'r, vs. Patterson et al.*, 209.
2. Where trust deed was executed prior to Code, but life tenant did not die till after, leaving remaindermen minors, the chancellor had authority, at chambers, to appoint trustee for minors and to order sale of property. *Ibid.*
3. Suit against trustee, who was life tenant, on individual debt, seeking to charge estate, and judgment by default; sale of trust property under *fi. fa.* enjoined for protection of remaindermen. *Keaton, trustee, vs. Baggs & Stephens et al.*, 227.
4. Interest of usee for life may be subjected to the claim. *Ibid.*
5. Determines at death of husband, trust for sole use of wife does. *Coughlin et al. vs. Seago*, 250.
6. Proceeds of homestead invested in other property, but by mistake title taken to wife as free trader, purchaser thereof, with notice, will, in equity, hold to same use as was the homestead. *Murray vs. Sells, for use*, 257.
7. Acceptance of trust may be by acts as well as words. *Mounger vs. Duke, adm'r*, 277.
8. Although words of deed or will do not create separate estate, yet if husband accepts appointment of trustee and acts thereunder, wife may maintain bill against his legal representative for the property. *Ibid.*
9. Trust for life of wife, remainder over, income from property belongs exclusively to wife. *Artoge, trust., et al., vs. Goodall, ex'r*, 318.
10. Property purchased with such income and title taken to trustee for wife, protected from marital rights of husband, though no technical separate estate was created by the deed. *Ibid.*
11. Action by trustee for married woman, not abate on her death where there is no administration, but proceeds for use of those entitled. *Ibid.*
12. Purchasers who do not claim under husband, cannot set up his marital rights to protect their claim to property of wife, when he could not assert them. *Ibid.* See, also, *Norworthy et al. vs. Blizzard*, 668.
13. *Aliter*, if they claimed under husband, and deed to wife created no separate estate, though they never saw such instrument. *Ibid.*
14. Covenant to stand seized of a sum of money to use of intended wife and children, accompanied by pledge and mortgage of entire estate, by solvent husband, creates a lien valid against creditors present and future. But as to property thereafter to be acquired, invalid. *Vason, trustee, et al., vs. Bell, adm'r, et al.*, 416.
15. Where trust is enforced in favor of one within marriage consideration, it will be enforced for benefit of volunteers. *Ibid.*
16. Marriage settlement cannot divest legal liens already acquired. *Ibid.*
17. Trust money creates no lien, unless it can be traced. *Ibid.*
18. Whether husband, by settlement, disabled himself from paying debts, question of fact. *Ibid.*

VENDOR AND PURCHASER.

1. Vendor taking notes for purchase money and giving bond for titles, may bring ejectment upon failure of vendee to pay any one of notes; nor

does his receipt of portion of purchase money, after all the notes are due, affect this right. *Alston vs. Wingfield, adm'r, 18.*

2. Notice of claim, possession by another of land, charges purchaser with. *Franklin, Reid & Co. vs. Newsom et al., 580; Wingfield, adm'r, vs. Davis, 655.*
3. Where money is advanced with which to complete purchase of land and title is taken as security, the lender stands in the same position as the original vendor. *Ibid.*
4. That widow of vendor claimed dower in land sold which had not yet been set apart, no defense to action on note for purchase money. *Fort vs. West et al., adm'rs, 584.*
5. That defendant paid too much for land, where he had opportunity for examination, no defense to note for purchase money. *Allen vs. Gibson, 600.*
6. Vendor not enjoined from collecting purchase money because there are judgments against him which can never affect property sold to injury of vendee. *Collins vs. Clayton, trustee, 649.*

VENUE. See *Jurisdiction, 3, 5, 7, 8.*

VERDICT.

1. May be amended in matter of form, especially if done in presence of jury. *Cook vs. Crocker, 66.*
2. Insurance companies, by common agent and name, issued policy which stipulated that each one was to be liable for one-fourth of loss. An action maintainable against them jointly and verdict may be moulded to conform to contract. *Sutherlin vs. Underwriters' Agency, 442.*

VOLUNTARY CONVEYANCE. See *Debtor and Creditor, 1-3.*

WAIVER.

1. Erroneous ruling complied with, cannot be made ground of new trial. *Hutchinson & Bro. vs. Jackson, 56.*
2. Defective service, judgment not set aside for after acquiescence for six years. *Hill vs. Hatcher, 291.*
3. Acquiescence in unauthorized act of partner after dissolution by members of firm, binds. *Roberts & Co vs. Barrow, et al., 314.*
4. Plea of not guilty and conviction thereon, too late to object to verdict and rulings on a previous trial of an issue formed on a special plea. *Bird vs. State, 602.*

WAREHOUSEMAN. See *Common Carriers, 2; Equity, 3.*

WARRANTY.

1. Land in adverse possession of third person under paramount title at time of conveyance, action accrues at once to vendee. *Durand vs. Williams, 76.*
2. Fertilizer, seller warrants it merchantable and reasonably suited to the use intended. He does not warrant against the seasons and bad cultivation. *Wilcox, Gibbs & Co. vs. Hall, 635.*

WAYS.

1. Use of private way through improved lands, to constitute a prescriptive right, must have been uninterrupted. *Puryear vs. Clements et al., 232.*

2. Private way established at instance of defendant, not bound to keep same in repair through his own land for benefit of those who may have acquired prescriptive right. *Ibid.*

WILLS.

1. Probated will, ordinary has exclusive jurisdiction to set aside. *Tudor et al. vs. James, adm'r, 302.*
2. Fourth item bequeathed eighty shares of stock for purpose of educating three minors, directing that they be boarded and educated out of the same until they received a thorough classical education. Twelfth item directed that balance of estate be divided between eight named children, the three minors among them, and further that when the youngest child became of age, the balance remaining of the railroad stock should be equally divided among the last-named children: *Held*, that the minors did not take an absolute estate in the stock. *Whitehead, adm'r, et al., vs. Park et al., 575.*
3. Parol evidence inadmissible to show that testator intended stock exclusively for minors. *Ibid.*
4. If such minors did not receive such education and support, they have a prior charge on said stock for the sum necessary to have effected this end. *Ibid.*
5. Bequest of money to widow for life, remainder over, executor should invest principal and pay over interest to widow, thus preserving the former. *Chisholm et al. vs. Lee, ex'r, 611.*
6. Remainder devised to daughter in fee simple, but if she should be dead at death of life tenant, or should subsequently die without issue, then to the children of certain nephews of testator: *Held*, that such children took contingent interests as executory devisees which passed to their heirs on their death before happening of contingency. *Payne vs. Rosser, adm'r, et al., 662.*
7. Such interests did not vest in those who were their heirs at time of their death, but to such as were heirs when executory devise fell into possession. *Ibid.*
8. The children referred to by testator took *per capita*. *Ibid.*
9. Signature sufficient evidence of knowledge of contents where testator could read and write. *Harris et al. vs. Harris et al., 678.*
10. Provision that greater proof of knowledge of contents required where scrivener takes benefit, not necessitate conclusive evidence. *Ibid.*
11. Words in will which was read over to testator, in different handwriting from body of instrument, not circumstance of suspicion against instrument, but may be considered by jury in determining its validity. *Ibid.*
12. Grand-children, whose parents were dead at execution of will, take under terms "children and their representatives," when. *Waddell et al. vs. Leonard, ex'r, et al., 694.*

WITNESS.

1. Defendant in ejectment, claiming under deceased husband, is incompetent to testify as to character of his possession, where the question at issue was, whether he held as tenant of plaintiff's ancestor, who was dead, or under an independent title. *Tomlinson et al. vs. Driver, 9.*
2. Payment set up by illegality and plaintiff in *fi. fa.* dead, defendant is incompetent witness. *Chancey vs. Carrigan, 84.*
3. Discredit his own witness, party cannot unless entrapped. *McDaniel vs. State, 253.*

4. Sustaining witness to one impeached by proof of general bad character, should at least be required to state that such character would not render him unworthy of credit. *Artope, trust., et al. vs. Goodall, ex'r*, 318.
5. Depositions taken because of infirmity of witness, discretion of court in sending for him not controlled. *Baker vs. Lyman, ex'x*, 339.
6. Witness swearing falsely in material matter, testimony rejected entirely unless corroborated. *Pierce vs. State*, 365.
7. Drunkenness competent to be proved, witness may give opinion accompanied by facts. *Ibid.*
8. Statement of officer that corporation had no notice of certain fact may be shown to be mere conclusions by cross-examination. *Southwestern R. R. Co. vs. At. & G. R. R. Co.*, 401.
9. Opinion as to health of party from witness who is not an expert, inadmissible without facts. *Southern Life Ins. Co. vs. Wilkinson et al.*, 535.
10. Divorce, libellant incompetent to prove adultery on proof of respondent. *Woolfolk vs. Woolfolk*, 661.
11. *Devisavit vel non*, upon trial of issue executor or legatee is competent. *Harris et al. vs. Harris et al.*, 678.

YEAR'S SUPPORT. See *Executions* 5.



